Message from the Chair

Martha Leary Sotelo, Chair
Trusts and Estates Section

It is my pleasure to introduce to you the fall edition of the Trusts and Estates Newsletter. This edition of the newsletter includes three articles with an emphasis on various estate administration issues. John T. Midgett and C. Arthur Robinson tackle the challenging subject of how to value claims or other intangible assets in an estate. Glen Robertson explores the availability of a suit for aid and direction when the fiduciary also has a beneficial interest in the estate or trust. Our final article authored by Mark V. Pascucci explores the boundaries of current Virginia law relative to attorney’s fees and executor fees.

I would like to express my thanks to our Editor C. Arthur Robinson and Assistant Editor, Jennifer Shirkey for their hard work in producing this edition of the newsletter. In addition I would like to thank each of the authors for their contributions to this newsletter. Obviously, without their contributions this newsletter would not be possible. We encourage any of our section members who are interested in contributing to the newsletter to contact Arthur and Jennifer. Arthur and Jennifer would welcome your support and you can find their contact information on the last page of the newsletter.

Please note that this edition of the newsletter will be the last one where members will be able to receive paper copies mailed to them. As Neal Brodsky noted in his comments last spring, starting in the spring of 2012 our newsletter will only be available in electronic format and will be sent via e-mail to all section members. We encourage you to confirm that the Virginia State Bar has an updated e-mail address for you so that your receipt of the spring newsletter will not be interrupted. The board of governors has decided to redirect the funds that were allocated to the publishing and mailing of the newsletter to our section’s website. We hope to upgrade our section’s website and our first step in that process is to convert former editions of the newsletter into an electronic searchable format. We hope that this will provide you a greater opportunity to use and refer to the newsletter articles in your daily practice.

In closing, I would also like to thank the members of the Board of Governors for their hard work and dedication to this section. It is my honor to serve with such a talented group of professionals. It is through the Board’s combined efforts with Virginia CLE that we are able to present the Annual Trusts and Estates CLE. If you were unable to attend the live presentations in October of the Annual Trusts and Estates CLE then we encourage you to view one of the many video replays of this presentation. We also encourage you to provide us with any suggestions for topics that you would like hear next year. The Board is committed to providing high quality presentations and we value your input.

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The Trusts and Estates Newsletter is published by the Virginia State Bar Section on Trusts and Estates for its members to provide information to attorneys practicing in these areas. Statements, expressions of opinion, or comments appearing herein are those of the contributors and not necessarily those of the Virginia State Bar or the Section on Trusts and Estates.
Pan Am Flight 103 was Pan American World Airways’ third daily scheduled transatlantic flight from Heathrow Airport to John F. Kennedy International Airport. On 21 December 1988, the aircraft flying this route, a Boeing 747–121, was destroyed by a bomb, killing all 243 passengers and 16 crew members with total fatalities of 270. Until 2003 Libya had never formally admitted carrying out the 1988 Lockerbie bombing. On 16 August 2003 Libya formally admitted responsibility (but did not admit guilt) for Pan Am Flight 103 in a letter presented to the president of the United Nations Security Council. On 29 May 2002, Libya offered up to $2.7 billion to settle claims by the families of the 270 killed in the Lockerbie bombing, representing $10 million per family. The Libyan offer was that:

- 40% would be released when United Nations sanctions, suspended in 1999, were cancelled;
- another 40% when US trade sanctions were lifted; and
- the final 20% when the US State Department removed Libya from its list of states sponsoring terrorism.

On October 31, 2008, President Bush signed Executive Order 13477 approving the removal of Libya from its list of states sponsoring terrorism.

Differing asset classes present different challenges in valuation. Valuation analysis can be thought of as a spectrum with assets having low risk and uncertainty such as cash, marketable securities, to asset classes that involve far greater risk and uncertainty. Your client, the surviving parent of one of the Pan Am passengers possesses a claim against a terrorist state, but dies prior to the payment of such claim. As part of your client’s estate tax return, how would a claim against a sovereign nation which was a sponsor of a terrorist bombing be valued?

We are all familiar with real estate and business interests which are far harder to value. There are other types of assets which, under the statutory framework, must be valued. Examples of these types of interests are: trust interests, blocks of accounts receivable, disputed contractual claims, and claims which arise in the context of torts, such as, for example, wrongful death claims. Fortunately, there is a methodology for evaluating the valuation of these types of claims.

The framework for evaluating the includability and valuation of claims made by an estate are contained within Internal Revenue Code §§ 2031 and 2033 where a claim is classified as a chose in action, to be included in an estate. The relevant measure of the amount to be included is fair market value as of the date of death. Fair market value is defined as “the price at which a willing seller and a willing buyer, neither being under any compulsion to buy or to sell, and both having reasonable knowledge of the relevant facts will choose to exchange the property.” IRC Treas. Reg. 20.2031-1(b); United States v. Cartwright, 411 U.S. 546, 551 (1973) In evaluating choses in action, there has been significant case law over some years, but the case law is not uniform with respect to the weight accorded to post-death events in valuing a claim at date of death.

Some courts have excluded post-death events in their analysis of the relevant facts, while in other cases the courts have included some post-death events as part of the relevant facts about which the buyer and seller should be aware. It is also clear from the case law that the value of enforceable actions have been discounted for hazards of litigation, delays in collection and other uncertainties and that the analysis is very closely driven by the relevant facts.

With tort claims, the following basic facts need to be compared and contrasted with respect...
to two (2) potential valuation discounts. First, the possibility that there will be some significant delay in the payment of the claim; and second, uncertainty associated with whether the claim would in fact ever be paid. In evaluating the uncertainty associated with whether a claim will ever be paid, the facts and circumstances surrounding the claim and the responsible party will be paramount. A judgment is made which is qualitative in nature about the risks of collection, potential enforceability and other potential risks to the realization and conversion of this type of asset into cash and these qualitative factors need to be evaluated carefully in each case. A careful analysis of all the unique facts is necessary, but once the facts are understood, a comparative analysis can be done.

A close analysis of the relevant case law indicates that discounts with respect to potential timing of payments had been allowed by the courts in a number of instances and are generally related to the potential uncertainty in terms of when payments might be made. In addition, in cases where credible evidence was demonstrated with respect to the uncertainty of a payment of a claim, the courts have allowed discounts ranging from 29% to 70%, and in several cases have taken the position that by virtue of unique facts and circumstances, that the claim ought not to be included in the federal transfer taxable estate at all.

In Estate of Baldwin v. C. I. R., T.C. Memo, 1961-89, that the value of a claim at the date of death was held to be equal to 69% of the fair market value of the actual property received by the estate post death. The court discussed the fair market value of the claim in light of the hypothetical buyer and seller test of § 2031 and noted difficulty in fixing a value. The claim being valued was a pending against the decedent’s brother, and the fair market value of the property received subsequent to the death of the decedent was an amount of $87,400. A $60,000 value of the claim was determined by the court. The court discussed the merits of the claim, the locale and the litigiousness of the surviving brother in assessing the uncertainty of whether the claim would ever be paid and held that a discount of 31% would apply. It is important to note that the court, in reaching its holding, assessed a 31% discount in this case even though the claim was clearly enforceable under United States law.

In Houston v. Commissioner of Internal Revenue, T.C. Memo 1982-362, 44 T.C.M., the value of a claim was held to be close to the amount of the actual settlement received, but different than the amount actually received. The claim was for wrongful death made by the surviving spouse on the death of her husband in an automobile accident. The total claim sought was approximately $640,000, and a settlement of some $132,500 was agreed to and paid out approximately 5.5 years after the wife’s date of death, to be divided evenly between the wife’s estate and her children. The court found the value of decedent’s claim to be $75,000, which was greater than the actual amount of $66,250 ($132,500 x 50%), and in evaluating the case the court took a close look at the facts at the time of death, as well as subsequent facts that established the uncertainty of the claim. The court cited Estate of Curry v. Commissioner, 74 T.C. 540 (1980) for the proposition that the court can look to events subsequent to the decedent’s death to determine value because, in this case, the value of the claim was not fixed as of the date of death. The Houston case points out a trend which is apparent throughout the analysis of cases: valuation analysis has a tendency to be fact-driven and specific facts can have significant impacts on the court’s decision.

In Rubenstein v. United States of America, 826 F.Supp. 448 (1993), the value of a claim was held to be equal to the net value of the actual property transferred in settlement of the claim. In Rubenstein the court noted that the taxpayer was unable to provide any evidence of fair market value and noted that the funds actually received were highly indicative of the value of the decedent’s share of the claim. Citing United States v. Simmons, 346 F.2d 213 (1965), the court noted that the willing seller and willing buyer test required both parties to have a reasonable knowledge of the relevant facts and that settlement proceeds could be relevant. It is interesting to note and distinguish this case since the court clearly identifies in Rubenstein that the taxpayer proffered no evidence as to the uncertainties which would impinge on fair market value.

In Bary v. Commissioner, T.C. Memo 1965-
322 (1965), the court held that the value of a claim against a foreign government was zero at the decedent’s date of death, (15 years prior to legislation that would enable her estate to make a claim). The court reasoned that at the date of death there was no basis in the law to allow a claim to be brought, as the enabling legislation allowing the claim was not enacted until 15 years later. The Court held that the value of decedent’s claim was zero at the date of death in 1940, because decedent did not have an enforceable claim until at least 1955 when Congress enacted legislation giving certain nationals of the United States enforceable rights against Russian assets held by the United States. Since the legislation did not exist at decedent’s time of death, decedent had no claim which could be enforceable under United States law at the time.

Bary makes clear that the claim which arose out of the seizure of assets from the Union of Soviet Socialist Republics arose by actions taken by a sovereign state, over which the taxpayers had no control. It is also instructive in the sense that it acknowledges that sovereign foreign governments were engaged in conduct for which there was no legal remedy under the laws of the United States. As against sovereign states, the only recourse, if such recourse is available, is through diplomatic and other means.

In Lennon v. Commissioner, T.C. Memo 1191-360 (1991), the court valued a claim at a 29% discount from the net settlement received by the estate. The discounts claimed by the taxpayer’s experts, which were greater than 40%, were deemed excessive by the court. However, the court also noted that the IRS placed undue weight on the actual settlement amount. The Internal Revenue Service argued for 2 valuations; first, the decedent’s interest in the total $7.75 million judgment, or second, the decedent’s interest in the net settlement received. The court stated “We believe $1.75 million for the date-of-death fair market value of decedent’s interest in the judgment reflects, among other things, the risk that the circuit court judgment would be modified on appeal and the delay the appeal would cause in the receipt of the award.” The court noted the taxpayer’s valuation disregarded the possibility of a substantial settlement and the possibility of recovering under maritime law.

The court in Lennon cited Gilford v. Commissioner, 88 T.C. 38, 52 (1987) stating: “This court has adopted the rule that generally ‘subsequent events are not considered in fixing fair market value, except to the extent that they were reasonably foreseeable at the date of valuation.’” The court also ruled that attorney’s fees are an appropriate reduction in the amount of the claim as the payment of the claim requires the payment of attorney’s fees.

In Davis v. Commissioner, T.C. Memo 1993-155 (1993), the court valued a claim at about 30% of the net settlement received by the estate, creating an effective 70% discount. The taxpayer’s expert witnesses testified to the value of the claim, and the court used a highly technical analysis to value the compensatory claim involved. For federal estate tax purposes the value of the gross estate is determined by including the value at the time of death of all property in which decedent has an interest, real or personal, tangible or intangible. The value of the property is the fair market value on the date of death. After reciting Treas. Reg. 20.2032-1(b), the court went on to state:

Having set forth these rather familiar principles for determining fair market value, we must admit that the valuation of a lawsuit continues to be a unique and abstract endeavor. A lawsuit is not the type of asset, either tangible or intangible, which readily fits within the categories of things regularly traded in commerce. Furthermore, the valuation process for lawsuits does not appear to be as objectively achievable as other types of assets. The concepts underlying lawsuits for punitive damages make valuation questions even more elusive and difficult to ascertain with a high degree of certainty.”

In this case, the court’s valuation included a 10% discount weighed to account for the time delay in receipt of the claim and applied this 10% per year discount for each of 2 years in reducing the value of the claim.

In American National Bank & Trust
Company v. United States, 594 F.2d 1141 (1979), the court specifically noted that it is appropriate to adjust fair market value for the time delay under which a payment might be received, and that actual settlement proceeds are not determinative of value. The court in its analysis argued that, notwithstanding some delay in the payment, the government’s position that the amount subsequently paid must be the value of the claim was inherently unreasonable. The court noted that such a result would entail a harsh and seemingly irrational taxing policy, requiring an estate to pay tax on the full amount receivable in these cases, regardless of when, or if, such amount were received. The court stated no specific provision exists in the Internal Revenue Code or Regulations to provide for recovery of taxes paid in such a situation and, therefore, the estate would bear the potentially insurmountable task of advancing money to pay taxes on funds not yet in the estate. The court remanded the case, with instructions to determine an appropriate discount with respect to the date of death value of an accident claim, and rejected the use of actual settlement proceeds as value.

In Biagioni v. Commissioner, T.C. Memo 1981-660, the court valued a claim at an amount greater than the actual settlement received by the estate 4 years later. The court noted that the taxpayer failed to introduce evidence of value, and found that a claim of $235,925 had a fair market value of $105,000. While the claim value was held to be greater than the settlement subsequently received, note the court still discounted the face value of the claim by more than 50% of $235,925.

In Bull v. Commissioner, T.C. Memo 2001-92, the court held the value of decedent’s rights in certain insurance reimbursements, as of the date of death was equal to zero, because the decedent’s rights were unenforceable at the date of death due to conditions precedent. The case is instructive because it stands for the proposition that factual impediments to payment should be recognized by the law as reducing the value of a claim potentially even to zero. The case reaffirms that fair market value, as of the date of death, and based on all relevant facts known at that time is the appropriate measure for value.

In Cobb v. Commissioner, T.C. Memo 1982-571, the court discounted the value of a claim with respect to the husband’s estate and specifically noted the difficulty in valuing a claim and in determining a discount for both litigation hazards, and for delay in receiving the funds. The case further states that a prospective purchaser of an estate’s interest in a claim would consider both the delay in receiving the funds as well as any other hazards or contingencies.

In Crossmore v. Commissioner, T.C. Memo 1988-494, the court gave a nominal 5% discount in valuing a decedent’s interest in another’s estate, stating that an undue influence claim that could bar decedent’s recovery was unlikely to be successful and did not garner a deep discount. The asset in question was an interest in the estate of another arising from a will that was not even probated at the decedent’s death. The decedent was left the entire estate of her aunt by will, who died 2 months before the decedent, but whose will had not been probated at the decedent’s death. The total value of the aunt’s estate was about $285,000. The decedent’s estate received most of these funds after expenses. The decedent’s executor valued this interest at $50,000 discounted for the possibility of an undue influence case, which could have barred decedent’s recovery. The IRS valued the interest at $279,000, the total cash in the estate less a $5,000 settlement payment. The court found decedent’s attorney too aggressive with discounts. The court noted that the decedent’s attorney himself admitted that most undue influence claims were not successful.

Ultimately, the court determined the probability was minimal that the decedent’s recovery would be barred by an undue influence claim, and any discount should reflect only a nuisance value of potential litigation. The court therefore provided a $15,500 discount on a $285,000 claim. The court noted that events after death are not controlling, and it carefully went through the merits of a potential undue influence claim before determining that only a minor discount was appropriate. That discount was approximately equal to 5.5%. The Crossmore case illustrates how fact specific the court’s inquiry must be and how specific facts illustrate uncertainties which are reflected in the discount.

This heavy dependence on factual analysis is further illustrated by a series of cases regarding
other interests where the court considered various risk factors. See the above table:

The reasoning in Curry v. Commissioner is particularly helpful.

The court indicated that the appropriate standard for valuation is fair market value as of the date of death. The court stated that §2031 provides that the value of the gross estate shall be determined by including the value of all property, real or personal, tangible or intangible. Section 2033 provides that the value of the gross estate include the value of all property to the extent of the interest therein of the decedent. As used in the statute, the term property encompasses all choses in action, including claims for services performed. The court pointed out that:

As a matter of law, the inclusion of an interest in the decedent’s gross estate at its fair market value does not command that the value of an estate be fixed at any specific amount. Rather, the (Fair Market) value of an asset must be determined in order to assess the tax. The value of every item of property includable in a decedent’s gross estate under §§ 2031-2044, is its fair market value at the time of decedent’s death. The fair market value is the price at which the property would change hands between a willing buyer and a willing seller; neither being under any compulsion to buy or to sell and both having reasonable knowledge of the facts. The fair market value of a particular item or property is not to be determined by a for sale price, nor is the fair market value of an item or property to be determined by the sales price of the item at a market other than that in which such item is most commonly sold to the public, taking into account the location of the item wherever appropriate . . . uncertainties and difficulties in determining value have never been considered justifications for obviating the necessary task of determining fair market value. Id.

Uncertainties provide no excuse for failing to value such assets. As the court said “Inexactitude is often a by-product of estimating claims or assets which do not have an established market and, therefore, the qualitative evaluation of such items is of necessity what must be done to obtain fair market value.”

<table>
<thead>
<tr>
<th>Case</th>
<th>Type of claim</th>
<th>Discount for delay</th>
<th>Discount for uncertainty</th>
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<tbody>
<tr>
<td>Livermore v. Commissioner</td>
<td>Production by oil wells</td>
<td>-</td>
<td>40%</td>
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<tr>
<td>T.C. Memo 1988-503</td>
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<tr>
<td>Gokey v. Commissioner</td>
<td>Trust Remainder interest</td>
<td>-</td>
<td>75%</td>
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<tr>
<td>T.C. Memo 1984-665</td>
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<tr>
<td>McGlue v. Commissioner</td>
<td>Right to receive executor’s commission</td>
<td>0%</td>
<td>0%</td>
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<td>41 B.T.A. 1199 (1940)</td>
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<tr>
<td>Skinker v. Commissioner</td>
<td>Contracts regarding contingent refunds</td>
<td>-</td>
<td>99%</td>
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<tr>
<td>T.C. Memo 13 B.T.A. 846 (1928)</td>
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<tr>
<td>Duffield v. United States</td>
<td>Fee contracts owned by Attorney’s Estate</td>
<td>Uncertain – summary judgment – Important for rationale</td>
<td>Uncertain – summary judgment – Important for rationale</td>
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<td>136 F. Supp 944 (1955)</td>
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<tr>
<td>Aldrich v. Commissioner</td>
<td>Contingent fee arrangement owned by decedents’ estate</td>
<td>Unstated reduction possible</td>
<td>Unstated reduction possible</td>
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<td>T.C. Memo 1983-543</td>
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<tr>
<td>Curry v. Commissioner</td>
<td>Deceased Attorney’s contingent fees</td>
<td>15%/year</td>
<td>-</td>
</tr>
<tr>
<td>74 T.C. 540 (1980)</td>
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In valuing a claim or chose in action held by an estate, an integral part of the analysis should be the extent to which, and the factual connection to, costs of attempting to collect the claim are present and relevant. These costs would include attorney’s fees among other potential expenses, and therefore, in many instances the logical construction of valuing the assets would include an analysis of what expenses might reasonably be incurred. The net realizable value of the asset would also be part of the valuation analysis. Relevant to valuation of expenses incurred in collecting a claim, are the contractual obligations the estate faces, for example, fee agreements, in collecting a chose in action on which an estate is proceeding in attempts to collect the same. Different conclusions regarding value will arise depending on whether the costs associated are contingent upon the collection of the claim or whether those costs are incurred on some other basis and are therefore tied indirectly or not at all to the probability of collecting the underlying claim.

Courts must value claims against an estate using a date of death value. This is consistent with the valuation analysis used for claims held by estates, as demonstrated by the previously cited cases. Courts have attempted to determine a claim’s date of death value and may regard, but not consider dispositive, the claim’s “face value” at the date of death or the actual amount paid out or received by the estate subsequent to the date of death. See Propstra v. U.S., 680 F. 2d 1248 (1982), Van Horne v. Comm., 78 TC 728 (1982), and Smith v. Comm., 198 F. 3d 515 (1999). In each of these cases, the courts attempted to determine the value of a claim against an estate using a date of death value. At least one other factual similarity exists; in all of them the face value of the enforceable claim at date of death was significantly greater than the settled claim amount after death ($596,000 as compared to $35,000, $2,400,000 as compared to $680,000, and $202,423 as compared to $134,826 Van Horne, Smith, and Propstra, respectively). In all of these cases the court attempted to determine the date of death value and did not base its decision solely on the settled value.

In analyzing the cases which evaluate intangible property several logical constructs emerge. First, it is clear that courts have recognized that in the case of intangible assets, where an enforceable contract exists with respect to an expense driven by those assets, that the courts have and will allow these expenses to reduce the value of the assets to be valued.

Second, in the case of intangible claims which will be paid subsequently, the courts have recognized that a delay in time with respect to payments, apart from any uncertainty as to whether payment would occur, is valid and should be recognized. In fact, the time value of money concepts, which recognize that a $1 paid at some time in the future is worth less than $1 paid today, are replete throughout the Internal Revenue Code. The valuation of uncertainty in when a potential claim might be paid is by its nature subject to less precision than the mechanical provisions within the Internal Revenue Code, but courts have recognized that such a discount is nonetheless valid. In the cases analyzed in this article, discounts with respect to the timing of payment have ranged between 5% and 15%.

Finally, with respect to discounts for uncertainty as to whether a claim exists (or is legally enforceable) and/or events which have yet to take place, conditions precedent and other contingencies have clearly been allowed by the courts. The analysis of these cases indicates that specific evidence with respect to all the facts and circumstances are an important underpinning of any decision, and where facts have been presented via testimony of qualified experts, or otherwise, that effective discounts ranging from 10% to 100%, have been adjudicated by the courts.

A methodology exists which enables the valuation of these less commonly encountered and intrinsically hard-to-value assets. That analysis, by its very nature, must be qualitative. A close comparison to existing cases, which make qualitative judgments about uncertainties leading to substantial discounts are instructive and permits taxpayers to take positions that have substantial authority resulting in substantial discounts being allowed by the Internal Revenue Service.
In Defense of the Suit for Aid and Direction as a Remedy for a Trustee-Beneficiary

By Glen M. Robertson

Virginia practitioners have long been aware of the availability of suits for aid and direction to guide fiduciaries in their administration of estates and trusts. Indeed, the jurisdiction of courts to consider such suits “is firmly established.” 2-28 Harrison on Wills and Administrations of VA and WV §28.03. While it also true that, in plain cases, the fiduciary is not justified in seeking aid, guidance or protection from the court and the estate or trust should not be subjected to that unnecessary expense, “when genuine doubt and difficulty confront the administrator in ascertaining the identity and relationship of the beneficiaries he is entitled to the aid and protection of a court of equity in a plenary suit. Id.

As Judge Lamb stated in his treatise:
Such a fiduciary is not required to act at his peril; he need not eat the doubtful vegetable in order to ascertain if it is a wholesome mushroom or a poisonous toadstool…

In such cases of doubt or difficulty the expense incident to instituting and conducting such a suit, including an allowance by the court of proper compensation to the fiduciary’s counsel, is to be borne by the estate, not by the personal representative out of his own pocket or out of his compensation or commissions.

Virginia Probate Practice (Lamb, 1957) §133, p. 238. See also, Gaymon v. Gaymon, 63 Va. Cir. 264 (Fairfax County, 2003).

Generations of Virginia practitioners have advised executors, administrators and trustees that “when provisions in a will may be susceptible of differing interpretations, it is prudent and proper for the personal representative to seek the aid and guidance of a court to obtain the correct interpretation.” 2-28 Harrison on Wills and Administrations of VA and WV §28.03. It is well-settled, too, that a personal representative does not exceed his authority by initiating an action to determine a question of law which is the proper province of a court and, where it is reasonably necessary for the fiduciary to engage counsel to represent him in the suit, the fiduciary is entitled to have his reasonable attorney’s fees paid by the estate or trust. Id.

It is also well-settled in Virginia that only a fiduciary may invoke the jurisdiction of a court for aid and direction and that beneficiaries of an estate or trust lack standing to do so. Burns v. Equitable Associates, 220 Va. 1020, 1028 (1980); Brewster v. Lane, 06 Va. S. Ct. UNP 060275 (2006). The character of such a suit as “neutral” among potential beneficiaries is underscored by the rule that the fiduciary may not appeal a circuit court’s ruling in an aid and direction suit since the fiduciary is not an “aggrieved” person under Va. Code Ann. §8.01-670(A) because the only remedy the fiduciary seeks is the court’s direction and guidance and, regardless of the interpretation adopted by the court in rendering that aid and direction, the fiduciary has received the remedy to which he is entitled. Shocket v. Silberman 209 Va. 490, 492-493 (1969)

None of the foregoing history and case law is new and none of these rules come as a surprise to Virginia trusts and estates practitioners. What might, though, is that at least one Virginia court has rejected the availability of an aid and direction suit by a trustee who was also one of the beneficiaries of the trust she administered. In holding that a trustee-beneficiary could not bring an aid and direction suit by a trustee who was also one of the beneficiaries of the trust she administered. In holding that a trustee-beneficiary could not bring an aid and direction suit where the court’s interpretation of the trust documents could result in an outcome favorable to the trustee in her individual capacity as a beneficiary, the court relied upon Va. Code § 55-548.02 and Commercial and Savings Bank v. Burton, 183 Va. 133, 139 (1944), to hold that filing
such a suit constituted a breach of fiduciary duty by the trustee.

Relying upon Burton, the court applied a three part test to evaluate the propriety of the trustee-beneficiary seeking aid and direction as to whether or not a certain handwritten document, which the trustee believed to be in the settlor’s handwriting, was sufficient under the terms of the trust agreement to effect an amendment of the trust which would have resulted in distribution of a certain condominium unit to the trustee in her individual capacity as a beneficiary. If the writing was insufficient to amend, the property remained in the trust for the benefit of the charitable income beneficiaries and, ultimately, the charitable remainder beneficiary. Citing Burton, the court considered (1) whether the conduct fell within the scope of the fiduciary’s powers and duties; (2) whether the conduct was undertaken in good faith; and (3) whether the conduct was consistent with ordinary prudence. Id.

In applying Burton to the facts before it, the court rejected the trustee’s argument that both Va. Code § 55-548.15 (A)(b), (which provides a trustee with “any other powers appropriate to achieve the proper investment, management, and distribution of the trust property”) and Va. Code § 55-548.16 (A)(24), (which empowers a trustee to “prosecute or defend an action, claim or judicial proceeding in any jurisdiction to protect trust property and the trustee in the performance of the trustee’s duties”) provided her with authority and standing to bring the aid and direction suit she had filed. Instead, the court ruled that, since the aid and direction suit involved the issue of whether the trustee, in her individual capacity as a beneficiary, would or would not receive a significant trust asset, a prudent trustee in the ordinary course of business would be unable to overcome the conflict and perform her fiduciary obligations to the trust and to its other beneficiaries.

The Court went on to cite Butt v. Murden, 154 Va. 10, (1930), in characterizing the case before it as one in which the beneficiaries of the trust were contesting who took what out of the trust and, as such, it held the matter should be left to the parties to litigate in their individual capacity.

Finally, the court ruled that the aid and direction suit constituted an action taken by the trustee to promote her own interests to the exclusion of the interests of other beneficiaries and, as such, held that the aid and direction suit was not chargeable to the trust and the trustee was ordered to reimburse the trust for attorney’s fees and costs expended in bringing the suit.

Virginia practitioners will recognize the serious implications for use of the aid and direction suit as a tool for trust and estate administration if this analysis is followed by other circuit courts. Obviously, many trusts are established with one or more family members named both as a trustee (or successor trustee,) and beneficiary. Under the analysis discussed herein, none of those trustees would have the ability to seek court guidance in administering the trusts if the advice sought could, in any way, potentially benefit them as beneficiaries--notwithstanding the long history of aid and direction suits in Virginia and the express authority provided by §55-548.15(A)(b) and §55-548.16(A) (24).

This analysis, with its potentially broad impact and significant change to trust and estates practice, appears to suffer from at least three flaws on both logical and public policy grounds.

First, a suit for aid and direction seeks only the court’s guidance and does not seek a specific outcome from the court. Where a fiduciary purports to bring an aid and direction suit but, in reality, files an aggressive and adversarial pleading which seeks a specific determination from the court rather than making an honest, un-biased request for guidance, the courts are already fully capable of rejecting the purported aid and direction suit as the adversarial claim that it actually is. See, e.g. In re Harold J. Dooley Trust, 2005 WL 877937 (Va. Cir. Ct.) The trustee’s lack of interest in the specific direction received is borne out by his previously discussed lack of standing to appeal the court’s direction given to him. Shockett, 209 Va. at 492-493.

Since an aid and direction suit is a neutral undertaking by its very definition, the suggestion that a fiduciary could be engaged in a conflict of interest by merely asking a court for guidance as to
how he is to proceed is intellectually inconsistent with the very nature of the remedy itself.

A second flaw is that preventing trustee-beneficiaries from seeking the aid and direction of the courts not only effectively eliminates this administrative tool for a large percentage of fiduciaries, but, even worse, eliminates it for those who are most at risk of liability and accusations of misconduct by disappointed beneficiaries. A fiduciary who has no “skin in the game” might still be accused of favoritism or breach of fiduciary duty by disappointed beneficiaries; however, it is inarguable that trustee-beneficiaries who are left to make such decisions on their own without the protection provided by the aid and direction suit are much more likely to be the target of such accusations. To eliminate the aid and direction suit as a remedy in the very cases in which it is the most important and most valuable flies in the face of the long history of this remedy in Virginia and renders the analysis highly suspect. It also flies in the face of the broad public policy which is articulated in the cases cited above.

The third flaw in the analysis is the logical extension and outcome of the second. Without the ability to bring an aid and direction suit, trustee-beneficiaries are left with two choices. They can decide the questionable issue against themselves in order to avoid potential suits by other beneficiaries. After making such an adverse decision as trustee, the only remedy then available to the trustee-beneficiary in his capacity as a beneficiary is to file suit against himself as trustee for breach of fiduciary duty. While such an outcome seems farfetched and inconceivable, it is, in fact, the very one required by the court’s application of Butt v. Murden and its order that the parties “litigate the matter in their individual capacities.” Since a beneficiary has no standing to bring a suit for aid and direction, a trustee-beneficiary would have no other recourse other than to sue himself in his capacity as trustee.

The other alternative for such a trustee-beneficiary would be to decide the disputed issue in his own favor and simply expose himself to suit by the other beneficiaries for alleged breach of fiduciary duty and self-dealing. Of course, protection from such suits is the reason for the existence of suits for aid and direction in the first place. The public policy goal is to decrease controversy and increase certainty.

Given the highly unfavorable alternatives available to a trustee-beneficiary denied the remedy of an aid and direction suit, it appears highly likely that this analysis would deter those closest to—and most trusted by—the settlor from serving as his fiduciary and leaving him, instead, to rely upon more expensive corporate fiduciaries who lack the same close commitment to him and who would lack the same great moral obligation to carry out his wishes as fully as they can be determined. In the final analysis, this is the greatest criticism of all. ♦
Ethical Issues in the Compensation of Attorneys Acting as Fiduciaries

By Mark V. Pascucci

“Compensation to fiduciaries is a veritable well spring of litigation.” Trotman v. Trotman, 148 Va. 860, 868-869, (1927)

Attorneys are often asked by their clients to serve as executor or trustee. In many cases, the attorney being named as executor/trustee is also drafting the document and may provide future legal services to the estate or trust in addition to serving as a fiduciary. Although Virginia law has abundant guidance on fiduciary compensation in general, the ethical restrictions of lawyers make these issues more complex.

This article analyzes and applies the current law to a few hypotheticals based on actual cases involving compensation for attorneys serving as fiduciaries and/or representing fiduciaries. The article notes questions as yet unaddressed in Virginia and provides practice tips as well.

Hypothetical #1. Dispute over Fiduciary Fees for Attorney/Executor.

The son, a beneficiary of his late father’s estate, questions appropriate attorney fees to the executor of his father’s estate. The father’s attorney drafted the Will, which named that attorney as executor. As the estate remained open for a number of years, the beneficiaries and attorney/executor disagreed on appropriate compensation; the former claimed a percent compensation would be appropriate, the latter claimed the Will granted him his hourly rate. We assume from the attorney/executor’s claim that the Will included a typical reference allowing corporate fiduciaries to be compensated according to their published fee schedules. We can infer from the beneficiary’s protest, that hourly rate compensation would exceed percent compensation. This fact pattern is typical of many “small” but time-intensive estates, where the executor’s fee as a percent of probate assets is far less than the executor’s fee at an hourly rate.

How should the attorney/executor be compensated? Does his reliance on a clause in the Will support his argument? Does/should a Will’s reference to a fiduciary’s “published fee schedule” include an attorney’s retainer agreement?

Hypothetical #2. Dual Fees with Beneficiaries’ Consent.

With the beneficiaries’ written consent, executors charge their full commission and retain attorneys who charge at their standard hourly rates to undertake to perform all services necessary to administer the estate, which include legal services as well as performance of the normal duties of the executors including filing of Inventories, Accountings and related tax work. The Will and related trusts are silent as to the compensation to be paid to executors or attorneys serving the estate. It should be noted that Virginia’s Guidelines for Fiduciary Compensation require an executor’s fee to be reduced by attorneys’ fees incurred in performing work normally considered the executor’s duties. Therefore, this arrangement violates those Guidelines, although it was consented to be the beneficiaries.

Is the attorneys’ conduct legal? Is it ethical?

Hypothetical #3. Legal Services for Estate Paid by Executors Individually Instead of by the Estate.

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Hypothetical #3. Legal Services for Estate Paid by Executors Individually Instead of by the Estate.
Attorney engages to represent executors, who, like Hypothetical #2, request that attorney provide all services for the estate, which includes legal work and normal executor duties. The attorney engages to represent the executors as individuals rather than as representatives of the estate. Legal fees for all services are billed to the executors as individuals, who pay the bills from their personal funds or their commissions or distributions from the estate. The executors take their full commissions, not reduced by any legal fees they are personally paying. The total of the legal fees alone is several times the allowable commission which would be calculated under the judicial council guidelines. In addition, the legal fees also appear significantly disproportionate to the work completed. However, since the bills were not paid directly from estate funds, they were not subject to a Commissioner’s review.

Is this arrangement legally permissible? Is it ethical? Should the legal bills be paid by the estate instead?

Review of Virginia Law:

Before we analyze the hypotheticals, a brief review of relevant law is in order. In Virginia, the right of a fiduciary to receive compensation is statutory. See Virginia Code §26-30, below. However, further guidance is found in Legal Ethics Opinions (“LEO’s”) and the Guidelines for Fiduciary Compensation (“Guidelines”). Following are LEO and Guidelines excerpts that pertain to the hypotheticals, as well as Virginia Code §26-30.

The commissioner…shall allow the fiduciary any reasonable expenses incurred by him as such; and also, except in cases in which it is otherwise provided, a reasonable compensation, in the form of a commission on receipts, or otherwise… Notwithstanding the foregoing…where the compensation of an institutional fiduciary is specified under the terms of the trust or will by reference to a standard published fee schedule, the commissioner shall not reduce the compensation below the amount specified, unless there is sufficient proof that i) the settler or testator was not competent when the trust instrument or will was executed or ii) such compensation is excessive in light of the compensation institutional fiduciaries generally receive in similar situations.

Virginia Code §26-30

Review of Guidelines for Fiduciary Compensation:


The Guidelines contain provisions on compensation under Paragraph A. DECEDENTS’ ESTATES. Certain of those provisions apply to estates and trusts and are reproduced below (excepting subparagraph 5, which applies only to estates):

1. Where the will clearly sets out compensation in a specific dollar amount or a specific percentage that the Executor is to receive, the will controls, and the Executor is entitled to the amount set out.

2. Where the will states that the Executor shall receive for services the compensation set out in a referenced published fee schedule in effect at the time such services are rendered, fees as set out in the fee schedule shall be presumed to be reasonable, as that term is used in §26-30. The burden of persuading the Commissioner that fiduciary compensation taken according to such a fee schedule is not reasonable would be on
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an objecting party. The ultimate responsibility of determining the reasonableness of the compensation rests with the Commissioner.

3. Paragraph 2. above does not apply in the case where the will is silent as to the Executor’s compensation. In such a case, if the Executor (corporate or otherwise) uses a published fee schedule to determine compensation, the other guidelines set out herein apply. There is, however, no presumption that such a published fee schedule is not reasonable.

4. Where all parties affected by the amount of the compensation are (i) competent to contract (ii) understand the issues involved (i.e., can give “informed consent”) and (iii) agree in writing as to the amount of the compensation to be paid, then the agreement should be honored by the Commissioner.

5. Unless determined as set out in paragraphs 1., 2. or 4. above, the fee to be allowed the Executor on all property in the decedent’s probate estate (calculated on the inventory value, including amended inventories) is as follows:

   a. 5% of first $400,000.
   4% of next $300,000.
   3% of next $300,000.
   2% over $1,000,000.

   Over $10,000,000 – by agreement with the Commissioner (prior consultation is required.)

   AND

   b. 5% of income receipts (not including capital gains).

7. If the Executor employs an attorney or accountant to perform duties that should be performed by the Executor, the fees of those persons should be deducted from the compensation due the Executor. Note that this does not apply to reasonable fees paid to attorneys or accountants for tax work or litigation or other legal services reasonably necessary for the orderly administration of the estate.

9. The Commissioner may also increase or decrease the otherwise allowable compensation in exceptional circumstances. Factors to be considered in determining the compensation include the nature of the assets, the character of the work, the difficulties encountered, the time and expertise required, the responsibilities assumed, the risks incurred and the results obtained. A consideration of these factors could result in a decrease or an increase of the compensation that would otherwise be determined using the standards set out elsewhere in these guidelines.

11. If, after examining these “Guidelines,” the Executor has any questions about the fee to be taken in a specific estate he or she should be encouraged to consult with the Commissioner in advance of taking any fee.

Review of Relevant Legal Ethics Opinions:

As shown by the Legal Ethics Opinions excerpts below, an attorney acting as a fiduciary may hire
himself or his firm to provide legal services. These LEO’s explain that, while a potential conflict exists, the remedy is full disclosure of the conflict and of the manner in which the attorney (and the firm) will be compensated as a fiduciary and as a legal representative of the fiduciary. The disclosure should be made prior to drafting the document naming the attorney as executor or trustee.

Thus, it is not per se improper for an executor or trustee (“fiduciary/partner”) to engage his own law firm to represent matters of estate administration. LE Op. 1387 (1990)

The Committee believes that...the lawyer’s fees [pertaining to the attorney’s service as executor/trustee] be adequately explained to the client; requiring a client’s consent, after full and adequate disclosure, to the lawyer’s financial interest when that interest may affect the exercise of the lawyer’s professional judgment on behalf of his client... LE Op. 1358 (1990)

The role of an attorney who serves as fiduciary to a trust or estate and additionally engages his law firm as attorney for the same entity presents a personal conflict... Clearly, in order to obviate the conflict, full and adequate disclosure must be made to the testator/grantor/client in the course of the preparation of the instrument and the client must consent in order for the attorney to proceed. LE Op. 1358 (1990)

The committee is of the opinion that the attorney named as executor or trustee must disclose and obtain the consent of the testator/grantor prior to the execution of the trust/will when the attorney intends to or is considering retaining his law firm as attorney for the trust or estate. The committee is of the further opinion that the disclosure must include the general compensation to be paid to the law firm. LE Op. 1515 (1994)

Based on the above LEO’s, an estate planning attorney whose client desires to name him as trustee/executor, should prepare a disclosure letter identifying the potential conflict and requesting a waiver, discussing the method of compensation the attorney would receive if acting as executor, and discussing the possibility of the attorney hiring his firm for legal services on behalf of himself as a fiduciary, and the potential costs and/or method of billing. The client should sign this before executing his/her documents.

Analysis of Hypothetical #1: Fiduciary Fees for Attorneys Serving as Executors

One of the difficulties in this hypothetical lies in tracing the potential dual roles of the attorney. What is the nature of his disputed time? Was he acting as an executor or performing legal services? His time may include both, or he may not have distinguished between the two himself. This line can be blurred and is often difficult to distinguish. In fact, it is possible the attorney expected an hourly rate and thought distinguishing between his administrative and legal services was moot. Based on the disagreement with the beneficiary, the attorney may not have clearly communicated or documented the manner of his compensation. At, or prior to, the execution of the Will, this attorney should have clearly disclosed that he would be compensated at his hourly rate.

Assuming a Commissioner would find both an hourly rate and a percent compensation reasonable, let’s review whether the attorney should be entitled to his hourly wage. He bases his assertion on the Will, which assumedly contains a provision regarding compensation. The analysis below focuses on what executor fees the attorney/executor would be entitled to receive based on alternate possible Will provisions.
If the Will contained a provision specifically allowing that attorney to be compensated as executor at his hourly rate.

Paragraph A(1) of the Guidelines entitles an executor to compensation where a Will “clearly sets out in a specific dollar amount or a specific dollar percentage.” But since an hourly rate is not a specific dollar amount or a specific percentage, the attorney in this case should not be entitled to hourly rate compensation. Therefore, the Will would not control the executor’s compensation, and a reasonable compensation must be determined.

However, if the hourly rate reference were interpreted as a reference to a “published fee schedule,” perhaps the attorney/executor could be entitled to hourly rate compensation under the published fee schedule analysis discussed below.

If the Will contained a provision referring to payment according to a published fee schedule, does this apply to an attorney?

If the Will contains a reference to a published fee schedule, then Paragraph A(2) of the Guidelines entitles an executor to payment based on that published fee schedule (which is presumed to be reasonable). But does Paragraph A(2)’s reference to published fee schedules apply only to corporate fiduciaries, or could it extend to attorneys as well? The Guidelines appear to contemplate the use of fee schedules by noncorporate fiduciaries; see Paragraph A(2), which refers generically to a fiduciary, and Paragraph A(3), which provides, “…if the Executor (corporate or otherwise) uses a published fee schedule…” If a noncorporate fiduciary can use a published fee schedule, perhaps this could apply to attorneys.

But to muddy the waters a bit, note the Code’s reference to published fee schedules may be narrower in scope than the Guidelines. §26-30 refers to the use of published fee schedules by an “institutional fiduciary.” This may exclude an attorney.

Perhaps a better question to ask is whether an attorney’s retainer agreement could be a “published fee schedule” under Paragraph A(2). This question has not been answered in Virginia, but the key issue should be whether a retainer agreement serves the same client-disclosing purpose as a published fee schedule. It should, provided the attorney follows the ethical disclosures required by LEO 1515 (which requires an attorney to effectively publish his “fee schedule” to the testator/grantor). If this is done, the client is no less informed than if he retained a corporate fiduciary with a published fee schedule. Arguably then, an attorney who follows LEO 1515 should be entitled to his hourly rates under Paragraph A(2).

LEO 1515 provides in part:

It is the committee’s opinion that full disclosure of the attorney/draftsman’s potential fees as executor or trustee or legal counsel to the estate must be made to the client…prior to the execution of the instrument. See Estate of Weinstock, 386 N.Y.S.2d 1…

The committee is of the further opinion that…disclosure be made in written form, signed by the testator/grantor, either in the will or trust agreement itself or in a separate document.

Furthermore, when the attorney/draftsman or a member of his firm is being named executor or trustee, the committee also believes that the attorney has a duty to suggest that the client investigate potential fees of others who might otherwise provide such services. Finally, the committee is of the opinion that an attorney/draftsman who contemplates charging separate fees for investment, tax or other services, over and above the fees for executor/trustee, must also fully disclose those separate fees.
In summary, although unanswered in Virginia, Paragraph A(2) and its favorable presumption should be found applicable to attorneys who follow LEO 1515. The practice of charging hourly rates instead of an executor’s percent fee is relatively common, and diligent attorneys will follow LEO 1515 in disclosing the manner in which they will charge fees as executors. In doing so, their clients receive notice regarding fees equivalent to a published fee schedule. Therefore, it would be equitable to afford the compensation agreements of those attorneys the protection and presumption of reasonableness under Paragraph A(2), which ends with this caveat: “The ultimate responsibility of determining the reasonableness of the compensation rests with the Commissioner.”

The above quote raises another question: should a Commissioner judge the reasonableness of an attorney/fiduciary’s fees by comparison to the rates of a trust company or bank trust department? Attorney/fiduciaries at hourly rates may be more costly than a trust company or other corporate fiduciary. The Guidelines and Virginia Code §26-30 allow a fee schedule to be overturned if “excessive” or not reasonable, in the Commissioner’s discretion. Is it fair to compare the rates of an attorney/fiduciary to the rates of a corporate fiduciary?

This author believes the answer lies in the client’s informed consent, by virtue of the attorney/fiduciary’s adherence (or lack thereof) to LEO 1515. Since LEO 1515 requires an attorney to recommend the client “investigate the potential fees” of alternate fiduciaries, the client will have made an informed decision to hire the attorney at his rates. Therefore, if LEO 1515 is followed, the Commissioner should restrict his review of an attorney/fiduciary’s rates only to rates of other attorneys.

Analysis of Hypothetical #2: Dual Fees with Beneficiaries’ Consent

The right to contract comes to mind here. It could be argued the attorneys have merely contracted to be paid in full for their services, and the beneficiaries have generously agreed to allow full executor commissions without a reduction as required by Paragraph A(7) of the Guidelines. However, informed and written consent of competent beneficiaries is required for the Commissioner to allow the compensation agreement. In this case, the beneficiaries should have been specifically informed of the reduction in executor commissions required by Paragraph A(7).

This hypothetical presents a situation where a compensation agreement results in essentially a “double dip;” the executors receive full commissions for work done by hired attorneys. This results in higher executor commissions than provided for under the Guidelines, but it may be acceptable based on the Guidelines’ directive for Commissioners to honor compensation agreements that meet certain requirements.

Paragraph A(7) of the Guidelines, provides:

If the Executor employs an attorney or accountant to perform duties that should be performed by the Executor, the fees of those persons should be deducted from the compensation due the Executor. Note that this does not apply to reasonable fees paid to attorneys or accountants for tax work or litigation or other legal services reasonably necessary for the orderly administration of the estate.

However, Paragraph A(4) requires a Commissioner to honor a compensation agreement, provided three requirements are met:

Where all parties affected by the amount of the compensation are (i) competent to contract (ii) understand the issues involved
(i.e., can give “informed consent”) and (iii) agree in writing as to the amount of the compensation to be paid, then the agreement should be honored by the Commissioner.

In obtaining consent, ensure the interests of minor beneficiaries are represented. In Estate of Griffith, the court acknowledged that adult beneficiaries can consent to executor’s commissions that exceed what would be allowable under Virginia law. In this case, the consent was in the form of an Accounting signed by the adult beneficiaries, which disclosed a high executor’s commission. Those signatures were deemed consent. However, the court found that the minor beneficiaries of the estate did not consent, because their mother had not consented in her capacity as their guardian.

Regardless of how Carolyn or Marilyn may view the meaning of their signing the second accounting, it is my opinion that by doing so they agreed to an executor’s commission of $13,954.00 for Rowley for administering the estate. They are both adults and had the capacity to agree to the commission even if it were in excess of what Rowley would be entitled to under the law.

The situation is different, however, as to the children because they are minors and their mother did not approve the fee as their guardian. Further, she had no authority to do so absent court approval.

In Re: Estate of Griffith, 20 Cir. C13820 (1993)

In summary, the dual fee agreement in this hypothetical should be honored by the Commissioner if Paragraph A(4)’s requirements were met: namely, the beneficiaries were competent, they understood that the agreement resulted in a higher executor commission than allowed under law, and an agreement for the amount of fees was reduced to writing.

Without the informed consent of the beneficiaries after the drafting of the instruments, changes in compensation are likely not permissible unless the Commissioner can be convinced that the total of executors fees and attorney compensation is reasonable. Finally, it is the attorneys’ responsibility to inform their executor clients regarding the proper beneficiary consent required.

Analysis of Hypothetical #3: Legal Services for Estate Paid by Executors Individually Instead of by the Estate.

Note, this hypothetical involves high attorneys’ fees charged for legal services to an estate and paid directly by executors. The Guidelines and LEO’s discussed in this article do not directly restrict the amount attorneys can charge for legal services in assisting an estate (although legal expenses paid by an estate are generally reviewed by the assigned Commissioner). Therefore, the issue at hand is primarily ethical.

In this hypothetical, the facts imply no prior agreement regarding fees existed between the attorneys and the Grantor/Trustee or Decedent. Significantly, we can infer the Commissioner and/or the beneficiaries will remain unaware of the fees of the attorney paid directly by the executors. The facts further imply that the legal fees incurred were not proportionate to the legal work performed.

While the beneficiaries and estate may not be directly harmed by the executors’ personal payment of high legal fees, an ethical question persists; the attorney has entered into an atypical contract that enables him to charge fees without any third party review. Granted, this is perhaps the case for many legal engagements, but is it proper in an area where Virginia law requires review? In a probate estate, Commissioners review expenses, including legal fees. Circumventing this review and then charging high fees appears unethical and could be viewed as a deliberate attempt to avoid the Commissioner’s review.
It is possible that the structure of this arrangement is contrary to the spirit of both the case law and the ethical guidance in Virginia regarding fiduciary compensation. By avoiding the Commissioner’s scrutiny, the parties have conducted indirectly what otherwise might not withstand a Commissioner’s review. At least thus far, no legal or ethical authority appears to deal directly with this fact pattern.

Does the attorney in this case have an ethical duty to inform the executors that his legal fees, if paid by the estate, would be reviewed by a Commissioner? This would at least ensure the executors had made an informed decision in engaging the attorney directly. Again, no guidance appears to deal directly with this case.

To sum up, attorneys serving as fiduciaries must be mindful of the ethical and legal restrictions regarding their engagement and their compensation. Many attorneys serving as fiduciaries will be providing both legal and administrative services, and they should preserve that distinction in their compensation agreements and their billing. Virginia law does appear to give slightly more deference to compensation agreements for fixed amounts, as opposed to published fee schedules or no agreement at all. The theme of the relevant ethical guidance is disclosure - of potential conflicts, of compensation amounts, advice to review alternate fiduciaries, etc. In all cases, discretion rests with the Commissioner as to reasonableness, unless, as in Hypothetical #3, fees are paid outside of the estate.

We close with a list of unanswered questions in this area and tips for best practices as well.

**Unaddressed Questions:**

- Virginia Code §26-30 (see also Guidelines Paragraph A(2)) states a Commissioner “shall not reduce” an institutional fiduciary’s compensation, when that compensation is specified under the trust or will by reference to a published fee schedule, unless, inter alia, that fee schedule is excessive:

  - Does an attorney’s retainer agreement, listing his fees, qualify as a published fee schedule? If so, should that attorney’s agreement receive the same favorable presumption of reasonableness under Paragraph A(2)?

  - Attorneys serving as trustees or executors at their hourly rates could be more costly than a bank or trust department…would this make attorneys’ rates “excessive” and subject to review, or should attorneys’ rates be measured only against the rates of other attorneys? Should an attorney’s adherence to LEO 1515 be a deciding factor?

  - Are Virginia’s general ethical guidelines applicable to and sufficient to prevent an attorney from making a contract similar to Hypothetical #3, which indirectly circumvents the specific legal and ethical guidance in this area?

**Practice Tips:**

- Review your Will and Trust provisions for compensation of fiduciaries, particularly if you are being named as a fiduciary. A fixed fee or percent included in a Will may receive stronger consideration than reference to a fee schedule, or if no reference is made at all.

- Prepare an “LEO 1515” letter for your clients to sign before executing any documents you prepared naming you as fiduciary. This letter should include the potential conflict and the manner in which you will be compensated as a fiduciary, a general description of the duties of the fiduciary, the potential fees that alternate fiduciaries may charge (perhaps disclosing the Guidelines’ fee schedule) and if you plan to retain your firm in a legal capacity, the manner in which
legal fees would be charged.

- When a fiduciary retains you for legal services, be sure to note that your legal fees expended for their administrative duties may reduce their commissions.

- Consider your billing when serving in a dual role – attempt to distinguish same.

- Do not name your law firm as trustee. Name an individual lawyer in the firm, and if needed, include your firm as being able to name a successor trustee. See Virginia Code 6.2-1001 for entities authorized to conduct trust business in Virginia.

- Consider the propriety and fundamental fairness of any fee arrangement for estate administration, irrespective of the specific guidance which may or may not apply to the arrangement.

- We are privileged to practice law. Let us diligently uphold our reputations as lawyers and the reputation of our profession as well.

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