

# ETHICAL DILEMMA: Charging a Contingent Fee in a Probate Matter

**When a probate client suggests paying a contingency fee – a small percentage of the gross value of the estate – in lieu of paying your hourly rate, is it okay to say yes? The answer is “no.”**

BY TIMOTHY J. PIERCE

## Question

A potential client approached me about possible representation as a nominated personal representative in winding up an estate in formal probate.

I am looking to build my practice in that area and so agreed to take the case. I presented my engagement agreement with my normal hourly rate, but the client suggested that I be paid 3% of the gross value of the estate.

I quickly checked the disciplinary rules, and there seemed to be nothing prohibiting this arrangement, but I have only ever heard of lawyers charging hourly fees in probate matters.

Am I permitted to charge a contingent fee based on the value of the estate in a probate matter?

## Answer

SCR 20:1.5(d) explicitly forbids lawyers from charging contingent fees “in any action affecting the family” or for “representing a defendant in a criminal case or any proceeding that could result in deprivation of liberty” but says nothing about fees in a probate proceeding. One could thus assume that the proposed arrangement is permissible.

The disciplinary rules, however, are not the only source of regulation of lawyers’ fees.

Wis. Stat. section 851.40 (Basis for attorney fees) states, in relevant part:

(2) Any personal representative, heir, beneficiary under a will or other interested party may petition the court to review any attorney’s fee which is subject to sub. (1). If the decedent died intestate or the testator’s will contains no

provision concerning attorney fees, the court shall consider the following factors in determining what is a just and reasonable attorney’s fee:

- (a) The time and labor required.
- (b) The experience and knowledge of the attorney.
- (c) The complexity and novelty of the problems involved.
- (d) The extent of the responsibilities assumed and the results obtained.
- (e) The sufficiency of assets properly available to pay for the services, *except that the value of the estate may not be the controlling factor.* (Emphasis added.)



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In *Estate of Konopka*,<sup>1</sup> the court of appeals upheld a trial court's determination that a probate fee agreement calling for the lawyer to be paid 4% of the gross estate was "contrary to legislatively declared standards" and therefore unreasonable.

While *Konopka* was not a disciplinary case and only addressed a challenge to the amount of the lawyer's fee in a probate proceeding, such statutes can have disciplinary consequences.

SCR 20:8.4(f) states that it is misconduct to "violate a statute, supreme court rule, supreme court order or supreme court decision regulating the conduct of lawyers."

This came into play in *Disciplinary Proceedings Against Roethe*,<sup>2</sup> in which a lawyer represented two co-personal representatives in administering an estate. The lawyer's engagement agreement called for the lawyer to be paid a fee of 3% of the gross value of the estate. The referee found that attorney Roethe's legal services agreement providing for a fee based upon a percentage of the gross value of the estate was a violation of Wis. Stat. section 851.40(2)(e), which controls billing in probate matters. The referee noted that Roethe was charged with violating SCR 20:8.4(f), which makes it professional misconduct for an attorney to violate a statute. The referee found that the Office of Lawyer Regulation met its burden of proof on count 1.

The Wisconsin Supreme Court upheld the finding of the referee, and the lawyer was publicly reprimanded.

In addition to the disciplinary rules, lawyers must be aware of other sources of law that govern their conduct. See prior Ethical Dilemma columns in *InsideTrack Weekly* and *Wisconsin Lawyer* that discuss statutes and cases that govern lawyer conduct. **WL**

**ENDNOTES**

<sup>1</sup>*Lontkowski Law Firm v. Estate of Konopka (In re Est. of Konopka)*, 175 Wis. 2d 100, 498 N.W.2d 853 (Ct. App. 1993).

<sup>2</sup>*Disciplinary Proc. Against Roethe*, 2010 WI 19, 323 Wis. 2d 611, 780 N.W.2d 139. **WL**