REDUCING LEGAL FEES IN PROBATE COURT CASES

AVOIDING HIGH LEGAL BILLS AND FEE DISPUTES

by Layne T. Rushforth

1. OVERVIEW

1.1 Overview: For cases in the probate court, including trust-administration cases, as well as probate cases, The Rushforth Firm, Ltd. ("the Firm" or "we") bills for legal services by the hour unless we agree otherwise in writing. For probate or trust cases where we represent the executor or trustee and for which our anticipated services are well-defined, we may charge a "base fee" for the anticipated services, which will be specifically stated in a written engagement agreement. When there is a "base fee", there will be no hourly charges except for work that is beyond what is specifically included in the "base fee". Our billing rates and policies are stated in our "Fee Policies Memo"[1], which is mandatory reading for our clients. If you do not understand something in the Fee Policies Memo or in the engagement agreement that we prepare, please ask questions. If you sign the engagement agreement, it will be presumed that you read it, you understood it, and agreed to its terms.

1.2 Hourly Billing: Work that is billed by the hour always involves time that is beyond our control. Sometimes, you, as the client, can control much of the time involved, but, for court-related cases, especially disputed cases, the time required is often beyond the client's control as well as ours. This memo focuses on things that you, as the client, can control.

2. CLIENT COMMUNICATION

2.1 Telephone Conference: *Consider scheduling a telephone conference instead of coming to our office for a consultation.* In practice, office consultations are often unnecessary and more time consuming than a telephone conference. We have a conference-call line and the ability to do video conferencing.

2.2 Out-of-Office Meetings: *Use out-of-office meetings only when essential.* Out-of-office meetings are expensive because they are always billed by the hour, starting from the time the attorney leaves the office until the attorney returns to the office.[2] Of course, this is in addition to the time to prepare for the meeting, the time to do a file memo after the meeting, and the time to do work that is triggered by the meeting. If an in-office consultation or a telephone conference will suffice, it will be more cost effective.

2.3 Limit Idle Chat: *Avoid extended discussions about other things.* We try to be friendly and conversational, but it is up to you to limit the discussion to your legal matter.

2.4 Consolidate Communication: *We encourage you to consolidate your communication.* By reducing the number of e-mail messages, phone conversations, and meetings, you will help keep the bill lower. Even for work that is billed using a base fee, there is a limit to attorney consultation time. Once the limit has been reached, all additional time is billed by the hour. The attorney consultation time includes all types of communication. We encourage you to communicate with us using the method you find most convenient. Sometimes a quick e-mail is best, but in some situations a phone call is more effective than typing back and forth.

2.5 Provide Thorough Information; Avoid Giving Too Much: *Provide completely any information we need, preferably in writing.* Much of our time preparing documents is spent in getting needed information from the client. An interview with an attorney or paralegal to obtain information is much more time consuming than getting the same information through a completed questionnaire or in an e-mail message. When sending us documents, providing us only the pages that are pertinent to what

we need will eliminate the need for us to charge you for our time to sort through and cull information from long documents.

3. CASE MANAGEMENT

3.1 Additional Services: *Limit additional services and changes.* If you ask for additional services or if you change your mind about what we are doing for you, your legal fees will be higher.

3.2 Document Revisions: *It is best to give us all your changes all at once, rather than asking for changes one at a time.* During a court case, you will be asked to review petitions, motions, oppositions, and other court-filed documents (the "pleadings"). It will save us time if you give us all of your comments, questions, and recommendations all at one time.

3.3 Court Case Tactics: *Make cost-effective decisions on case strategy*. In probate and trust-administration cases in the probate court, some procedures and petitions are mandatory, and we can usually let you know what will be involved in those matters. In contrast, where there is a dispute or where a decision is to be made in the court's discretion, the best we can do is to advise you as to your legal options and tell you what strategy might be appropriate for your case. On such matters, you will make the ultimate decision. We can never guarantee a victory, and sometimes a bad decision by the court can be remedied only by an appeal (or the equivalent), which is always expenses (and also a gamble). We are unable to give an accurate estimate of legal fees in disputed court matters because of the unpredictability of the actions of opposing parties and their attorneys, as well as the decisions of the Probate Commissioner or Probate Judge. We can and do tell clients that a course of action may not be cost effective, but it is up to the clients to tell us whether they want to move forward with that course of action. (When a client tells us, "It's the principle of the thing", it usually that the legal fees may exceed the monetary benefit of the legal action, even if we are successful. If you tell us to pursue a strategy because of "principle", it tells us that you are willing to gamble even when the odds are against you (and it is possible that we will increase the amount required as a retainer).

3.4 Settlement Options: *In disputed matters, always consider negotiating a settlement with the opposing parties.* In some disputed trust and probate cases, the only real winners are the attorneys. If you are willing to compromise in order to settle the dispute, you may be financially ahead, even though you may not get all you think you are entitled to. Mediation can often lead to a settlement or can sometime reduce the number of disputed issues that have to be dealt with by the court. It is common for settlement discussions to become more serious as the attorneys' fees get higher, but we recommend considering settlement as early as possible.

4. ILLUSTRATIONS

4.1 Probate Case: Sam died, and his daughter is the named executor under the Will. Sam's Will leaves everything to his two children equally. Without the executor's permission, the Sam's son took Sam's car (worth $10,000) from the garage and is using it.

(a) *Scenario One*: The executor is angry and asks us to file a petition asserting that her brother took the car without permission and asking for treble damages. The executor is advised that the granting of the petition is discretionary with the judge, and may trigger fees without any benefit. Despite that, a petition is filed, and multiple hearings are scheduled, resulting in $5,000 in legal fees. If the court declines to award treble damages, the $5,000 has been wasted.

(b) *Scenario Two*: To make sure that the car is properly insured, the executor and her attorney work with her brother to get the proper auto insurance policy, resulting in $700 in additional legal fees. On behalf of the executor, a petition is filed, asking the court to have the car considered as part of her brother's share of the estate and to charge his estate with the cost of arranging for the auto insurance. Unless the son objects, this will not trigger any significant additional fees.

4.2 Trust Administration Case: Sarah established a revocable trust naming her husband, Fred, as her successor trustee. Fred and Sarah's children, Linda and Ronald, are beneficiaries of the trust, which provides for distributions for support in the trustee's discretion during Fred's lifetime, after which Linda and Ronald become the sole beneficiaries. Fred is not father of Linda or Ronald. Because of acrimony between Fred and Sarah's children, Fred makes generous distributions to himself and only nominal distributions to Fred and Sarah. The declaration of trust has a "no contest clause" that eliminates the share of a beneficiary who contests the trust or who unsuccessfully challenges the actions of the trustee. Linda and Ronald want to file a petition to remove Fred as the trustee. They are advised that their interests are discretionary, and Nevada law only allows a challenge to a trustee's exercise of discretion if it can be proven that the trustee acted unreasonably, dishonestly, with improper motivation, or failed to act at all. They have no evidence, but they think that they can obtain evidence through depositions and by obtaining documents.

(a) *Scenario One*: They say they want to proceed with a court action because of "the principle of the thing." Even after being warned that the "no contest clause" might be invoked if they are unsuccessful, they proceed. The petition, depositions, and court hearings trigger $100,000 in legal fees, and the court declines to rule in their favor and finds that they unsuccessfully challenge the trustee's actions, resulting in their elimination as beneficiaries of the trust.

(b) *Scenario Two*: Linda and Ronald decide to wait on any court action until they have more evidence of wrongdoing. They demand a trustee's account, which they are entitled to receive as the ultimate beneficiaries of the trust. Fred refuses to provided an account, and he writes a letter explaining to them that he is in control and that he intends to spend the trust primarily for his own benefit, leaving little or nothing for their benefit after his death. Now they can show that the trustee has breached his duty by failing to account and by acting out of improper motives, they write a letter demanding his resignation. When he fails to resign, the legal action is commenced, and the court finds that the trustee's actions are in violation of the law and of the trust instrument, and the trustee is removed. The legal fees may still be $100,000, depending on how hard Fred fights, but Nevada law permits the court to make Fred pay those fees from his own funds if it is proved that he "was negligent in the performance of or breached his or her fiduciary duties."

5. FALSE ECONOMY

5.1 Setting A "Ceiling" on Fees. Some clients ask us to pursue a case within a fixed budget. We cannot accommodate such a request because no one can predict how any case will unfold. Almost every case becomes more complicated than originally anticipated. Because an attorney in a case cannot withdraw from a case without court permission even though the attorney is not being paid, we cannot take the risk of having to work without pay. We do not take contingent fee cases, and we will only agree to defer payments if a client agrees to pay interest and provides adequate security.

5.2 Limiting the Legal Tools. Some clients try to save money by limiting our billable time.

(a) Here are some examples:

(1) A client may instruct us not to take depositions or use other "discovery" tools because they are expensive.

(2) A client may decline to engage an expert witness when it is advisable to have one.

(3) A client may want to take action during a probate case or disputed trust case without conferring with us for legal advice.

(b) There is a false economy to such actions. At best, a case that is managed with significant restrictions will be crippled, and the chances for success will be diminished. At worst, actions taken by a fiduciary or beneficiary without proper counsel can inadvertently trigger unintended consequences, such as a violation of the trust or the violation of its no-contest clause. Even if it is possible, fixing problems after the fact is usually more expensive than doing it right the first time.

6. CONCLUSION

6.1 Minimizing Our Time. If you want to keep fees to a minimum, you can help by controlling the time that we need to spend to accomplish your objectives. This is not done effectively by restricting our use of legal tools, but it is done by using efficient communication, avoiding unnecessary or uneconomical diversions into minor issues, by providing solid evidence, and by developing and following a well-thought out case strategy.

6.2 Balancing the Risk and Reward. Because court battles are unpredictable, there is a "gambling" element to every case, which means that both the rewards of success and the risk of failure need to be considered when deciding whether to pursue a case and what strategy to employ. Keeping an open mind as to settling a disputed case can reduce the cost and stress associated with litigation.

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NOTES:

1. http://rushforthfirm.com/billpay/feepolicies.pdf.

2. The "Fee Policies Memo" explains special rules that apply to out-of-town meetings.