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**GRIEVANCE ISSUES
AFFECTING PROBATE
PRACTITIONERS**

Presented By:

**Attorney Wayne M. Rice
Bar Counsel
Akron Bar Association**

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GRIEVANCE ISSUES AFFECTING PROBATE PRACTITIONERS

Review of Grievance Process

- Only investigate written grievances
- Initial review: confirm attorney lives and/or maintain principal office in Summit County; check to see if attorney has been the subject of previous grievances and/or sanctioned; review court dockets; contact grievant for additional information; contact attorney if matter can be resolved with a phone call, turning over of files, transcripts
- Dismissal on intake: no substantial, credible evidence that misconduct has been committed (i.e. no “actionable violation of the Rules of Professional Conduct); pending litigation; malpractice
- Refer for investigation: letter to attorney (with copy of grievance) requesting a written response, evidence of malpractice insurance, information regarding attorney’s IOLTA account, other pertinent documentation; investigator conducts telephone interviews with both grievant and attorney, reviews documentation (may request correspondence with client, IOLTA statements, etc.).
- Investigator makes recommendation to dismiss or refer to Grievance Committee for additional investigation. If referred to Grievance Committee, a three-member panel is appointed (two attorneys and one lay person) to interview both the grievant and attorney in person (with a court reporter present); request additional information, talk to other parties, etc.
- Panel makes a recommendation to full Grievance Committee to dismiss or file a complaint with the Board of Professional Conduct. If a complaint is filed, the attorney is given Notice of Intent to File and 14 days from receipt of the Notice to respond to the allegations in the complaint.
- After the complaint is filed, the Board of Professional Conduct will review it for certification. If the complaint is certified, the matter is assigned to a three-member probable cause panel. At this point, the grievance becomes public. The probable cause panel conducts a hearing with the relator (bar association filing the complaint) and the respondent present and then makes a recommendation to the Board of Professional Conduct regarding possible sanctions. The Board of Professional Conduct then reviews the probable cause proceeding and issues a Finding of Fact, Conclusions of Law and Recommendation to the Supreme Court.
- Supreme Court issues a Show Cause Order giving the respondent the opportunity to object and the relator the opportunity to respond to the objections. If respondent objects, there is a hearing before the Supreme Court. The Supreme Court then issues its ruling either confirming the recommendation of the Board of Professional Conduct or assessing its own sanction.
- Sanctions can range from a public reprimand, to a term suspension (with all or part of the suspension stayed, with or without conditions), indefinite suspension or permanent disbarment.
- If we dismiss a grievance at any stage, the grievant has the right to appeal our decision to the Office of Disciplinary Counsel. In such a case, we copy the entire file and send it to ODC. The standard of review is abuse of discretion or error of law.

Recent Disciplinary Investigations

Excessive Fees

No. 2008-1174

Respondent was asked to look after an individual's financial affairs following the individual's hospitalization for a stroke. The Respondent prepared a power of attorney making Respondent attorney-in-fact over the individual's finances and healthcare. Respondent also drafted a trust agreement with the Respondent as trustee. Respondent had never served as a trustee before.

The trust assets were slightly less than \$200,000. Over a period of 20 months, Respondent charged fees of at least \$46,300 while the individual remained in a nursing home. The individual hired another attorney to assist in the sale of her home. The second attorney questioned the fees and, after not receiving a satisfactory answer from the Respondent, filed a grievance.

The second attorney was concerned about the provision in the trust that permitted Respondent to charge \$150 for "extraordinary services" such as preparing a nursing home application and ensuring healthcare insurance coverage. In reality, Respondent repeatedly charged the extraordinary rate for ordinary charges such as picking up the individual's mail.

Respondent also received advances for his fees, but did not deposit the same into his IOLTA account. Respondent stipulated to commingling funds.

Sanction: Six month suspension, stayed on the condition of no further misconduct during that period.

13-0521

An attorney filed a grievance on behalf of his client, the co-executor of the client's father's estate. Respondent had been appointed guardian of the decedent and had charged the guardianship fees in excess of \$26,000 for an estate with a value of less than \$150,000.

The decedent's family had contested the legal fees charged in the guardianship; however, the Probate Court approved both the fees and time spent by Respondent on the case. Respondent did return a portion of the fee through the Probate Court's mediation services.

Sanction: None; dismissed after investigation.

13-1113

Grievant retained Respondent to complete the handling of grievant's father's estate. The grievant thought that it would not take long to wrap up the estate, but it ended up taking another three years due in part to evaluation of its substantial assets and the lack of diligence on the part of Respondent. Initially, Grievant had agreed to pay Respondent \$5,000 plus another \$2,000 for a collateral estate matter. Grievant terminated Respondent's services prior to the filing of the

Final Accounting and, in response, Respondent filed a Statement of Services in excess of \$22,000. A hearing on fees was held in Probate Court and the Magistrate awarded Respondent \$7,000. Grievant objected, but the Judge affirmed the Magistrate's ruling.

Sanction: Dismissed after investigation, due in part to Respondent's filing of an Application for Retirement or Resignation with the Supreme Court, which the Supreme Court subsequently accepted as a Resignation with Discipline Pending (there was another disciplinary matter involving Respondent pending before the Supreme Court).

Failure to Act with Reasonable Diligence

2009-2080

A client retained Respondent to handle a release from administration of the client's father's estate. The client signed the probate documents, gave Respondent the father's will and a retainer of \$1,000. Respondent deposited the check into Respondent's IOLTA, and withdrew it several months later. Respondent never filed the papers on behalf of the client. The client retained other counsel, who requested the client's file from Respondent. Respondent did not turn the file over for several months.

Sanction: One-year suspension, stayed upon conditions including refunding the retainer fees paid, signing a contract with OLAP and following its recommendations, reporting to an attorney chosen by relator to monitor Respondent, and attend a law office management program.

15-1008

Grievant retained Respondent to represent Grievant in a personal injury/wrongful death action arising out of the death of Grievant's mother and to represent Grievant in the probate proceedings for the estate.

Grievant's primary complaint was the length of time it took Respondent to provide proceeds from the wrongful death action to be applied to the payment of the mortgage on the mother's residence and failing to send quitclaim deeds to Grievant's siblings to transfer their respective interests in the residence to Grievant.

The investigation determined that the relationship between the Grievant and Respondent turned sour early on, Grievant lost trust in Respondent and the relationship became strained. The investigation also revealed that Respondent's office had sent Grievant three of the four quitclaim deeds and there was some misunderstanding as to when Respondent would make payment toward the mortgage.

Sanction: Dismissed after investigation.

Alterations/false statements

2011-0866

Respondent was retained by the beneficiary of an estate to oppose the application of the beneficiary's sister to serve as fiduciary of their deceased mother's estate. Respondent filed an appearance in Probate Court and a motion to recognize Respondent's client as the executor named in the will.

Respondent arrived at court for what Respondent believed was a hearing, but was told that it was the deadline for submitting objections to the appointment of the sister as fiduciary. Respondent returned to Respondent's office to prepare objections. In the course of doing so, Respondent requested information from an online service that provides background reports for a fee. In addition, Respondent searched a government website that provides case and docket information. Based on the information Respondent obtained, Respondent prepared and filed written objections alleging that the sister would be prohibited from serving because of a personal bankruptcy and felony record that would preclude her from obtaining a bond.

Subsequently, it was determined that the sister was not the individual named in the bankruptcy proceeding or felony case that Respondent had researched. Respondent withdrew Respondent's objections once Respondent suspected that the information was not correct. Respondent subsequently filed a motion for mediation in which Respondent amended the objections to remove most of the allegations made about the sister.

Sanction: Six month suspension stayed pending no further misconduct during that period.

2016-0258

Respondent altered a client's will after it was executed but before filing it with probate court. The client had met with Respondent to discuss preparation of estate-planning documents. Clifton inadvertently failed to list one of the client's three children in the will. The omission had no effect on any of the distributive or appointive provisions because it was the client's intent to leave his entire estate to a trust with one child as the primary beneficiary, a second child as the contingent beneficiary and no mention of the omitted child. The client did not notice the omission when he executed the will.

Respondent noticed the omission after the primary beneficiary retained him to probate the client's estate. Before filing the documents with the Probate Court, and without consulting any of the children, Respondent altered the first page of the will to include the name of the omitted child.

The omitted child had a copy of the will as executed and questioned the document that Respondent filed with the Probate Court. Thereafter, Respondent moved to withdraw as counsel for the executor and explained the alteration. Respondent also self-reported the incident to Relator.

Sanction: Public reprimand.

16-022 (Recently certified complaint)

Respondent was retained to handle the estate of an individual Respondent had represented for several years. Respondent filed an Application to Probate Will and the surviving spouse was appointed executor. Several months later, Respondent and the executor entered into a fee agreement whereby the executor agreed to pay Respondent \$200 an hour for Respondent's services in the estate. The fee agreement also provided that Respondent could retain co-counsel and that the executor would be consulted concerning co-counsel and any fee arrangement prior to the retention of co-counsel.

During the pendency of the estate proceedings, Respondent was suspended from the practice of law for two years, with one year stayed for conduct unrelated to the estate. Respondent did not inform the executor of the suspension and filed an Application for Certificate of Transfer on which Respondent forged the executor's signature twice.

The Court issued a citation based on Respondent's failure to file an accounting. Both Respondent and the executor attended the hearing. Respondent was accompanied by another attorney whom Respondent identified as co-counsel. The executor did not have prior knowledge of Respondent's retention of co-counsel. Respondent also informed the executor for the first time that Respondent's license had been suspended.

Sanction: Case pending.

Stealing from Clients

2014-1205

Respondent stole funds from four individuals on whose behalf Respondent had been appointed guardian of their respective persons and/or estates by the Probate Court. Respondent pled no contest to each of the charges contained in a Bill of Information. Respondent was sentenced to four and one-half years in prison and ordered to make restitution in the amount of \$208,095.

Sanction: Indefinite suspension with conditions for reinstatement including full restitution.

2015-0293

Respondent, among other things, filed an application seeking the appointment of another individual as fiduciary for the estate of a decedent. The Probate Court approved a wrongful-death settlement and Respondent deposited the proceeds into Respondent's IOLTA account. Respondent made several distributions pursuant to the Probate Court's order, but was unable to apply approximately \$10,888 toward the purchase of an annuity for the benefit of the decedent's three minor children. The failure was due supposedly to the funds being deposited into Respondent's IOLTA account rather than paid directly to the annuity company. In April 2011, a Magistrate wrote to Respondent and requested that Respondent take action to close the estate,

but Respondent did not receive the letter. After the Court issued a show cause order, Respondent appeared and stated that the funds were still in Respondent's IOLTA and that Respondent would invest the same in a money-market account for the benefit of the minor children.

Starting in November 2012, Respondent began to misappropriate the funds for Respondent's own use. Several months later, Respondent liquidated a retirement account to replace the misappropriated funds, but then withdrew those funds as well. Later, Respondent again replaced the misappropriated funds.

Sanction: Two year suspension with 18 months stayed, subject to conditions, including restitution to the minor children of the original amount plus the interest that would have been earned if Respondent had purchased the annuity in a timely manner.

16-027 (Recently certified complaint)

In 1996, Respondent prepared an investment trust for a client and served, at the client's request as the trustee. Respondent invested the initial \$15,000 as instructed by the client. In 2011, the client, on two separate occasions, gave Respondent \$30,000 and \$15,000, respectively, to invest. Respondent did not make either investment. When the client asked Respondent if the funds had been invested, Respondent replied that Respondent was too busy and had not done it yet. Eventually, the client told Respondent to hold the funds and invest them when the share price of the fund was lower.

Respondent did not deposit the funds into an account titled in Respondent's name as trustee, but rather in Respondent's IOLTA account.

Approximately a year later, the client asked Respondent to give back \$8,000 of the funds for his own use, which Respondent did, using a check drawn on Respondent's IOLTA account.

Shortly thereafter, the client suggested that Respondent invest some of the funds and the share price had dropped. Respondent did not do so. About three years later, the client wanted to buy a new vehicle and made arrangements to meet the Respondent, but Respondent failed to keep the appointment. Eventually, the client caught Respondent as Respondent was leaving the office. Respondent admitted spending all of the \$37,000 in Respondent's IOLTA account.

Sanction: Case pending

Conflict of Interest

Respondent was retained by a client to represent her as the executor of her father's estate. Three of the client's sibling and seven of the decedent's grandchildren, who also were beneficiaries of the estate, attempted to remove Respondent's client as executor and filed objections to the estate inventory. Upon request, Respondent also agreed to defend the client and her husband against the family members' objections and attempt to remove her as executor. Respondent failed to explain to the client and her husband that representation of both of them in their personal capacities created a conflict of interest. The family members eventually withdrew their request and due to the extensive litigation, Respondent filed applications with the Court for partial

payment of attorney fees. Notwithstanding the local rule and the Court's order, Respondent asked the client for payment of Respondent's fees, with the understanding that the estate would eventually reimburse the client when it was terminated. Between March and July 2013, the client paid \$17,820 to Respondent and \$5,500 to an attorney who had assisted Respondent. In October 2013, the Court awarded Respondent only \$14,000 in fees for activities conducted on behalf of the estate. Prior to filing the Final Accounting, Respondent endorsed an estate check for \$14,000 and then delivered those funds to Respondent's client. When Respondent filed the Final Account, he did not report that the client had paid \$23,320 in attorney fees and, instead, reported that only \$14,000 in attorney fees had been paid.

Sanction: Six-month suspension stayed in its entirety on conditions.

The Supreme Court of Ohio

BOARD OF PROFESSIONAL CONDUCT

65 SOUTH FRONT STREET, 5TH FLOOR, COLUMBUS, OH 43215-3431

Telephone: 614.387.9370 Fax: 614.387.9379

www.supremecourt.ohio.gov

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DIRECTOR

D. ALLAN ASBURY

SENIOR COUNSEL

HEIDI WAGNER DORN

COUNSEL

OPINION 2016-1

Issued February 12, 2016

Withdraws Advisory Opinion 96-4

Flat Fee Agreements Paid In Advance Of Representation

SYLLABUS: It is proper for a lawyer to enter a flat fee agreement requiring a client¹ to pay a fixed amount in advance of representation. The flat fee agreement must comport with the Ohio Rules of Professional Conduct. Under Prof.Cond.R. 1.15(c), a lawyer is required to deposit flat fees and expenses paid in advance for representation into an IOLTA account, unless designated as “earned upon receipt” or similarly, and only may withdraw the fees as they are earned or the expenses as they are incurred. This is a change from former DR 9-102(A). Even if a flat fee paid in advance of representation is deemed “earned upon receipt,” “nonrefundable,” or similarly, Prof.Cond.R. 1.5 requires a lawyer to return any unearned portion of the fee if the lawyer does not complete the representation for any reason. Additionally, the Rules also require that a flat fee must not be excessive under Prof.Cond.R. 1.5(a); that a lawyer shall not provide financial assistance to a client, aside from advances of court costs and expenses of litigation under Prof.Cond.R. 1.8(e); and a lawyer is required to provide competent and diligent representation to each client under Prof.Cond.R. 1.1 and 1.3.

OPINION: This opinion addresses a flat fee agreement requiring a client to pay a fixed amount in advance of representation. It does not address payment of a retainer to an

¹ The Board acknowledges that the Adv. Op. 96-4 addressed this issue in the context of criminal matters; however, the Board has elected to consider the issue in other contexts.

attorney to secure availability of the lawyer's services over a period of time without regard to a specific matter.

QUESTION:

Is it proper for a lawyer to enter a flat fee² agreement requiring a criminal defendant to pay a fixed amount in advance of representation in a criminal matter?

Fee agreements must comply with Rule 1.5 of the Ohio Rules of Professional Conduct. Prof.Cond.R. 1.5(a) is the cardinal rule governing fee agreements and provides that a lawyer shall not "make an agreement for, charge, or collect an *illegal* or clearly excessive fee." Several factors should be considered in order to determine if a fee is reasonable:

- (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 limitation 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;
- (8) whether the fee is fixed or contingent.

Prof.Cond.R. 1.5(a)(1)-(8). These factors are not exclusive. Prof.Cond.R. 1.5, Cmt. [1]. Additionally, fixed fees are expressly recognized as a type of legal fee in Prof.Cond.R. 1.5(a)(8).

² As used in this Opinion, the terms "fixed fee" and "flat fee" are afforded the same meaning and are used interchangeably. The Board acknowledges that there are other types of fixed fees, such as a fixed hourly rate. A fixed fee may not necessarily be a "flat fee."

A lawyer is not permitted to enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case. Prof.Cond.R. 1.5(d)(2). As a result, fixed fee agreements are required in criminal representations.

A flat fee is a type of fixed fee. Fixed fees or flat fees are considered an alternative to hourly billing in different types of matters because they provide the client a degree of certainty about the cost of the legal services. Douglas R. Richmond, Understanding Retainers & Flat Fees, 34 J. LEGAL PROF. 113 (2009). A flat fee is “a fee of a set amount for performance of agreed work, which may or may not be paid in advance but is not deemed earned until the work is performed.” Prof.Cond.R. 1.5, Cmt. [6A]. Flat fees are based on factors independent of the actual number of hours involved in a representation. A lawyer earns a flat fee by performing the services for which the fee was charged, and that fee is the maximum amount that will be charged for the services to be performed. Douglas R. Richmond, *Understanding Retainers & Flat Fees*, 34 J. LEGAL PROF. 113 (2009).

Criminal matters do present uncertainty with regard to the amount of time that may be expended, since the matters may be resolved through dismissal, plea agreement, or trial. Time is one factor to consider when determining the reasonableness of a fee under Prof.Cond.R. 1.5(a). However, the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003) unequivocally disapprove of flat fees in death penalty cases because the client’s interests are pitted against the lawyer’s interest in doing no “more than what is minimally necessary to qualify for the flat payment.” ABA Standards of Criminal Justice: *Providing Defense Services, Commentary to Standard 5-2.4* (3d ed. 1993).

This Board has addressed the use of flat fees in the context of a flat fee agreement between a law firm and an insurer/third party administrator of group health benefit plans. In Opinion 95-2 (1995), the Board advised that the propriety of a flat fee agreement is based upon a variety of factors. A fixed flat fee is subject to the restriction in former DR 2-106(A) [now Prof.Cond.R. 1.5(a)] that it not be excessive. A fixed flat fee cannot circumvent the requirement of DR 5-103(B) [now Prof.Cond.R. 1.8(e)] that clients must remain liable for expenses of litigation. Additionally, a fixed flat fee agreement must not limit an attorney’s duties of competent and diligent representation to each client under Prof.Cond.R. 1.1 and 1.3.

When the payment of a flat fee is made in advance of representation, there are additional ethical considerations, such as when a flat fee is required to be placed into the lawyer’s client trust account, and what, if any, portion of the fee is refundable. See, Prof.Cond.R. 1.5(d)(3), Cmt. [6A].

When a flat fee is earned affects whether or not it must be placed in the lawyer's trust account. Prof.Cond.R. 1.5, Cmt. [6A]. Prof.Cond.R. 1.15(a)³ requires a lawyer to keep the property of clients separate from the lawyer's own property. Client and third-person funds paid to a lawyer or a law firm must be maintained in an insured, interest bearing account, designated as "client trust account," "IOLTA account," or with another identifiable fiduciary title, and in a financial institution in the state where the lawyer's office is located. Prof.Cond.R. 1.15(a). Additionally, under Prof.Cond.R. 1.15(c), lawyers are required to place legal fees and advances on litigation expenses paid by the client into a trust account, unlike DR 9-102(A), which precluded a lawyer from placing client advances into a trust account.

An "earned upon receipt" fee is a flat fee paid in advance that is deemed earned upon payment regardless of the amount of future work performed. Prof.Cond.R. 1.5, Cmt. [6A]. When a fee is denoted as "earned upon receipt," those fees are considered the lawyer's funds, and not the client's funds. As a result, those fees should not be placed in the lawyer's IOLTA account, as it is impermissible to commingle a lawyer's own funds with those of a client.

A lawyer who receives a flat fee paid in advance for representation in a legal matter is obligated to return any unearned portion of the fee.⁴ Prof.Cond.R. 1.5(d)(3), 1.16(e). Even if a fee is designated as "earned upon receipt," "nonrefundable," or similarly, Prof.Cond.R. 1.5 requires a lawyer to refund any unearned portion of a fee paid in advance if the representation is not completed for any reason. Additionally, Prof.Cond.R. 1.16(e) states that "[a] lawyer who withdraws from employment shall refund promptly any part of a fee paid in advance that has not been earned, except when withdrawal is pursuant to Rule 1.17."

The Board withdraws Opinion 96-4, which analyzed former DR 9-102(A), and concludes that Prof.Cond.R. 1.15 requires flat fees paid in advance for representation must be placed in a client trust account. A flat fee for representation in a matter may not be placed into the attorney's business or operating account, unless it is designated as "earned upon receipt" or similarly and the client is advised in writing that if the lawyer does not complete the representation for any reason, the client may be entitled to a refund. Prof.Cond.R. 1.5(d)(3).

³ Prof.Cond.R. 1.15 includes provisions that are not contained in former DR 9-102.

⁴ See also, *Columbus Bar Assn. v. Farmer*, 111 Ohio St.3d 137, 143-44, 2006-Ohio-5342, ¶ 31, 855 N.E.2d 462, 469 (citations omitted) (A lawyer has a duty to account for and return any unearned fees).

CONCLUSION:

It is proper for a lawyer to enter a flat fee agreement requiring a client to pay a fixed amount in advance of representation. The flat fee agreement must comport with the Ohio Rules of Professional Conduct. Under Prof.Cond.R. 1.15(c), a lawyer is required to deposit flat fees and expenses paid in advance for representation into an IOLTA account, unless designated as "earned upon receipt" or similarly, and may withdraw the fee only as it is earned or the expense as it is incurred. If a lawyer designates a fee "earned upon receipt," "nonrefundable," or similarly, the client must be advised in writing that the client may be entitled to a refund under Prof.Cond.R. 1.16(e) for any part of an unearned flat fee paid in advance of representation. Under Prof.Cond.R. 1.5(a), the flat fee must not be excessive. Under Prof.Cond.R. 1.8(e), the lawyer shall not provide financial assistance to a client, aside from advances in court costs and litigation expenses. Under Prof.Cond.R. 1.1 and 1.3, the flat fee agreement must not interfere with an attorney's duties to provide competent and diligent representation to each client.

Advisory Opinions of the Board of Professional Conduct are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Rules of Professional Conduct, the Code of Judicial Conduct, and the Attorney's Oath of Office.