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## **Department of Attorney General Charitable Trust Compensation Resource**

The Department of Attorney General regularly reviews compensation of professional fiduciaries, agents of professional fiduciaries, and attorneys representing or serving as professional fiduciaries (collectively “estate agents”).

For purposes of this resource, professional fiduciaries include personal representatives and trustees who hold themselves out to the public as professional fiduciaries.

This document is intended to assist the public and professional fiduciaries in evaluating compensation of estate agents. It is broken down into two sections: 1) Professional Fiduciaries, Agents of Professional Fiduciaries, and Attorneys Representing or Serving as Professional Fiduciaries; and 2) Further Resources.

This document is not intended to provide guidance in assessing the reasonableness of *lay* individuals or *financial institutions* serving as fiduciaries.

### **Section 1: Compensation of Professional Fiduciaries, Agents of Fiduciaries, and Attorneys Representing or Serving as Fiduciaries.**

Case law, statutes, and court rules, related to compensation of estates suggest the following general rules regarding the calculation of reasonable rates and invoicing practices for professional fiduciaries, and attorneys representing or serving as professional fiduciaries.

1. Generally professional fiduciaries, or attorneys representing or serving as professional fiduciaries, must calculate their fees based on the local market rate for the services provided and must provide invoices or statements that show the work performed broken down by date and time.
2. Professional fiduciaries marshal assets, enter into real estate listing agreements and attend closings, close financial accounts, submit insurance claims, redeem bonds, communicate with C.P.A.s, fill out SCAO (court) forms, serve notices on interested persons, appear in court, and in general administer estates without the assistance of an attorney. Professional

fiduciaries use attorneys for “necessary legal services,” such as litigation, and seldom use them to assist or advise on estate administration because professional fiduciaries know how to manage an estate.

3. The job of fiduciary and attorney have historically been treated as separate jobs.<sup>1</sup> The compensation of a fiduciary should be adjusted by the value of services based on fiduciary or business acumen – not based on other professional skills such as attorney skills – and if an attorney is unwilling to accept that rate, they should decline the representation.<sup>2</sup>
4. Generally, an attorney serving as a professional fiduciary cannot charge their attorney rate for fiduciary services, use a combined attorney/fiduciary rate, or adjust their professional fiduciary rate above the market rate for non-attorney professional fiduciary services – such a practice generally violates case law, fiduciary duties, or statutes.<sup>3</sup> The attorney serving as a professional fiduciary must utilize an invoice that separately identifies attorney services from fiduciary services.
5. Although there is no precise formula for determining the reasonableness of fees for attorneys, professional fiduciaries, or agents of fiduciaries,<sup>4</sup> the following chart contains factors courts will consider:

Attorney Fees	Additional Authority on Attorney Fees	Fiduciary Fees
MRPC 1.5 (a) (1) – (8); <i>Smith v Khouri</i> , 481 Mich 519, 537 (2008).	<i>Pirgu v United Services Auto Assn</i> , 499 Mich 269, 281-282 (2016). <i>Wood v DAIIE</i> , 413 Mich 573, 588 (1982).	<i>Comerica Bank v. City of Adrian</i> , 179 Mich. App. 712, 724 (1989).
(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.	The difficulty of the case, i.e., the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly. <i>Wood / Pirgu</i> factor {2}	[6] The time and the services required. [3] The character of the work involved. [5] The knowledge, skill, and judgment required and

<sup>1</sup> See *Wisner v Mabley's Estate*, 70 Mich 271, 285 (1888); MCL 700.3719; *Matter of Estate of Kiebler* 131 Mich.App. 441 (1984)

<sup>2</sup> See *Wisner v Mabley's Estate*, 70 Mich 271, 285 (1888).

<sup>3</sup> See *Wisner v Mabley's Estate*, 70 Mich 271, 285 (1888); MCL 700.3719; *Matter of Estate of Kiebler* 131 Mich.App. 441 (1984)MCL 700.1212; MCL 700.3703; and MCL 700.7801 and MCL 700.7814; MCR 5.310; MCL 700.7811; *Matter of Green Charitable Trust*, 172 Mich. App. 298, 317 (1988) (citation omitted).

<sup>4</sup> *In re Temple Marital Trust*, 278 Mich. App. 122, 138 (2008); *Comerica Bank v. City of Adrian*, 179 Mich. App. 712, 724 (1989); MRPC 1.5; and *In Re Lujan*, 2018 WL 1308124 (unpublished).

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		used. [2] The responsibility involved.
(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.	<i>Wood / Pirgu</i> factor {6}	
(3) The fee customarily charged in the locality for similar legal services.	Although this is not one of the eight <i>Pirgu / Wood</i> factors, it is important because the fee award analysis <u>begins</u> by determining the reasonable hourly rate customarily charged in the locality for similar services and multiplying that by the reasonable number of hours to arrive at a baseline figure. Then apply <i>Pirgu / Wood</i> factors to determine adjustment. <i>Pirgu</i> at 281.	[11] The custom in the community for allowances.
(4) The amount involved and the results obtained.	<i>Pirgu / Wood</i> factor {3}	[1] The size of the trust/estate. [4] The results achieved.
(5) The time limitations imposed by the client or by the circumstances.	<i>Pirgu / Wood</i> factor {7}	
(6) The nature and length of the professional relationship with the client.	<i>Pirgu / Wood</i> factor {5}	
(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.	<i>Pirgu / Wood</i> factor {1}	
(8) Whether the fee is fixed or contingent.	<i>Pirgu / Wood</i> factor {8}	
	The expenses incurred. <i>Pirgu / Wood</i> factor {4}	[7] The manner and promptness in performing its duties and responsibilities.
		[8] Any unusual skill or experience of the trustee.
		[9] The fidelity or disloyalty of the trustee.
		[10] The amount of risk.
		[12] Any estimate of the trustee of the value of her services.
	“Factors not exclusive and the trial court may consider any additional relevant factors. In order to facilitate appellate review, the trial court should	“The weight to be given any factor and the determination of reasonable compensation is within the probate court's discretion. In this regard, we

	<p>briefly discuss its view of each of the factors above on the record and justify the relevance and use of any additional factors.” <i>Pirgu</i> at 281-282.</p>	<p>note that while time spent is one indicator of value, it may be a poor indicator in some circumstances.” <i>Comerica</i> at 724.</p>
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The first step in determining a reasonable attorney fee is to review surveys or other evidence of rates customarily charged in the locality for similar legal services, and then multiply that number by a reasonable number of hours for the services claimed.<sup>5</sup> And while *Comerica Bank* states the weight to be given any factor in evaluating the reasonableness of fiduciary fees is determined considering the circumstances, generally, the fee customarily charged in the locale by professional fiduciaries will be extremely relevant.

*Red flags.* The following billing practices are generally improper:

- 1) Professional fiduciaries, or attorneys acting as professional fiduciaries, delegating their work to agents who charge more than the professional fiduciary when the professional fiduciary is capable of performing the work. This often occurs where an attorney acting as a professional fiduciary uses his paralegal to handle administrative work at the paralegal’s normal firm rate. If the attorney is unwilling to accept a market rate for fiduciary services, then the attorney should decline to serve.<sup>6</sup> If the attorney failed to calculate a reasonable fee for their service as fiduciary, this wrong (excessive fiduciary fee) does not make a second wrong (delegation to a paralegal) right. This billing practice is corrected by reducing the rate to the market rate for non-attorney professional fiduciaries.
- 2) An Estate Agent charging for duplicative services. A common example is a law firm that uses multiple attorneys and paralegals. Generally, the use of more than one attorney is improper unless each attorney practices in a different area of law relevant to an unresolved issue in an estate. Unless more than one attorney is necessary, meetings at law firms by multiple attorneys is unnecessary. Another example is where a fiduciary bills to redo services that the fiduciary failed to perform properly the first time. This issue is corrected by denying payment.
- 3) Attorneys and paralegals running errands such as locking up houses, going to banks, hiring contractors, etc. It is corrected by reducing the rate to the market rate for non-attorney professional fiduciaries.
- 4) The charging of fees based on percentages is generally improper outside of a few recognized exceptions:

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<sup>5</sup> See *Smith v Khouri*, 481 Mich 519, 537 (2008).

<sup>6</sup> See *Wisner v Mabley's Estate*, 70 Mich 271, 285 (1888).

- a. Attorneys litigating a matter (contingency based on outcome).
- b. Realtors selling property.
- c. Bank fiduciaries for customary charges.<sup>7</sup>

It is corrected by attempting to calculate a reasonable fee for the service. This can be difficult if the estate agent did not keep records showing the date of services and time spent on tasks. It should be noted that the lack of documentation of services where documentation could have been provided is generally weighed against the party seeking compensation.

*Permissible billing for attorneys serving as professional fiduciaries.*

If an attorney serving as a professional fiduciary separates their charges on their invoices to show attorney work and professional fiduciary work, utilizes market hourly rates for each type of work, does not charge a professional fiduciary fee above the market rate for non-attorney professional fiduciaries in their area, and performs all work customary of professional fiduciaries at that rate without delegations to individuals charging more, then the fees charged are generally permissible.

Be aware that any billing by the attorney or the attorney's support staff at their normal law firm rates for matters germane to the job of a professional fiduciary is likely improper. The billing at those rates by the attorney and their staff should generally be the exception and not the rule.

## **Section 2: Further Resources.**

[The State Bar of Michigan, 2020 Economics of Law Practice Attorney Income and Billing Rate Summary Report has fee information for attorneys broke down by area of practice and location.](#)

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<sup>7</sup> See *In re Estate of Lujan*, unpublished opinion of the Court of Appeals, issued March 13, 2018 (Docket No. 335581), 2018 WL 1308124, p \*4; See MRPC 1.5(c) (It is also questionable if a fee based on a percentage of the inventory value of an estate is permissible; it is not a contingency fee based on the outcome of the matter).