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FEATURE ARTICLE

Lawyer Fee Basics: Reasonableness

U.S. State codes of professional responsibility based on the *Model Rules* generally have a fundamental requirement that a lawyers' fees be reasonable. In Kansas, KRPC 1.5(a) states:

> (a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:
>
> > (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 limitations 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; and
> >
> > (8) whether the fee is fixed or contingent.

Missouri Rule 4-1.5(a) states:

> (a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:
>
> > (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 limitations 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; and
>
> (8) whether the fee is fixed or contingent.

The only differences between the two states' basic rules is that Kansas requires fees to "be reasonable" and that Missouri requires that fees "not be unreasonable" and that Missouri explicitly states that expenses charged also not be "unreasonable." There has been some discussion in the literature about whether there is any practical difference between states that use the language "not unreasonable" versus those that use the language "be reasonable." In practice, *based on the enumerated factors in Rule 1.5*, a court or tribunal will determine that a specific fee charged was "reasonable" or "not unreasonable" in the same way. Similarly, one should assume, even if not explicitly stated, that "unreasonable" expenses charged to a client may draw negative scrutiny and decisions from a reviewing court or tribunal.

The Eight Factors of Lawyer Fee Reasonableness

The eight enumerated factors are the most important parts of Rule 1.5(a). A brief review of each is worthwhile.

Rule 1.5(a)(1)

Rule 1.5(a)(1) requires that the reasonableness of the fee be determined, in part, by looking at the specific work for which the fee has been charged and the ability of the attorney to do that work. First, and most obvious, is the time and labor that the work required. The more time and labor required, the higher the fee may be. This is the cornerstone of the time billing method. The more one works, the more one may be paid. The requirement that the difficulty of the specific work be considered is somewhat more complex. Since it is listed separately from time required, the difficulty factor must relate to something other than the fact that more difficult work requires more time to complete. The fact that the third factor, the skill required

to do the work is also a separately listed factor in Rule 1.5(a)(1) also means that the difficulty factor cannot simply refer to the idea that some tasks require greater skills and, therefore, the client can expect to pay more to someone who had greater skills (I like to use the analogy between hiring an apprentice plumber and a Master plumber when explaining this to my students).

I would suggest that the difficulty factor in Rule 1.5(a)(1) really gets at something not explicitly mentioned in Rule 1.5's enumerated factors: risk. The more difficult a task, the greater the risk that the lawyer may make a mistake. The greater the likelihood that a lawyer may make a mistake, the greater the possibility that the lawyer may ultimately face financial liability and reputational damage. As an example, if a lawyer agrees to handle a simple DUI case, unless the lawyer is unskilled and inexperienced in criminal law and DUI representation, then the risk of making a mistake is quite low. On the other hand, if a lawyer takes on a complex capital case, the risk of making a mistake during the representation is likely far greater—even though the lawyer may be competent in general criminal law representation. It is a basic economic principle that the greater the risk one undertakes, the greater the reward should be for undertaking that risk. Hence, the more difficult case and the greater financial and representational risks involved should justify a higher fee for the representation.

The final factor listed in Rule 1.5(a)(1), the skill requisite to perform the task, goes directly to the qualifications of the lawyer and overlaps, to some extent, with Rule 1.5(a)(7). The more skills a lawyer possesses generally is directly connected to the abilities, training, and experience of a lawyer. These factors not only reflect a lawyer's personal investment in her skills, but, also, often mean that the more skilled lawyer may be able to accomplish a specific task in a shorter time. For example two lawyers in a law firm may both practice in the corporate tax area. One has practiced for thirty-five years and is highly skilled in a large variety of corporate tax matters. The second has been in practice for a decade and is also competent, but has worked on fewer types of tax problems. The second lawyer can handle a particular tax matter, but will need to do extensive research to do so competently (as permitted under Rule 1.1). The more experienced and skilled lawyer can also do the work required, but will not need to do extensive research because she has handled similar matters many times. Thus, the second, more skilled and experienced lawyer will complete the task in a shorter time frame. If the lawyers use time billing, the more experienced lawyer will bill less time for the work because of her greater skills. Fairness would require that the more skilled lawyer be able to charge a higher rate than the less skilled lawyer. Nevertheless, the client may well benefit with a lower overall fee because of the shorter time billed as well as from the fact of having the work done more quickly. From an economic incentive standpoint, if the Rules did not permit lawyers to set fees, at least in part, based on their skills and experience, they would have little reason to continue to improve those skills since there would

be no financial reward for doing so.

Rule 1.5(a)(2)

Rule 1.5(a)(2) requires that, in determining the reasonableness of a fee, the lawyer and any fee review consider whether taking on a specific representation might preclude being able to take on other work. On the one hand, if a lawyer takes on a case and because of this does not have the time to take on a different case that would involve the same amount of work and similar fees, there seems no detriment to the lawyer and this should not justify a higher fee. However, there are situations in which taking on a client will have substantial potential repercussions. First, taking on a particular client may result in a lawyer's inability to take on other clients in the present or future because of the conflict rules. If the representation holds no promise of future employment for the lawyer and precludes possible long term and more lucrative employment with other potential clients, once again, fairness would seem to suggest that the lawyer should be able to consider this in setting the fee. Indeed, if this were not permitted, lawyers would be less likely to take on such a "one off" client, limiting access to representation. Similarly, a criminal lawyer might be asked to take on the defense of an unpopular client—so unpopular that the lawyer might find that her practice was significantly negatively impacted by taking on the client (this is often the case with the representation of individuals facing terrorism charges, for instance). Here, again, the Rules should permit charging a higher fee because of the "cost" to the lawyer of taking on such a client.

Rule 1.5(a)(3)

Rule 1.5(a)(3) is the factor that most lawyers and courts look to first: the fee customarily charged in the locality. Once again, there are a number of points to be made. First, the factor calls for a comparison to other lawyers' fees "in the locality," not in the jurisdiction. Thus, for instance, a lawyer in Miami County, Kansas, should compare her fees to other lawyers in Miami County and not in Sedgwick County. The assumption is that fees will be determined, in part, by local economic conditions. In reality, we know that fees in major urban centers will generally be significantly higher than in rural locations. Second, Rule 1.5(a)(3) must be viewed in the light of the other Rule 1.5 factors, so that one might gloss Rule 1.5(a)(3) by stating that the comparison should be made to the fees of other "similarly situated" lawyers in the same locality, thereby recognizing the impact of the other Rule 1.5 factors. Third, in practical terms, if a lawyer's fee must be defended on review, normally this will be done by presenting the testimony of lawyers "in the same locality" who are familiar with fees commonly charged therein.

Rule 1.5(a)(4)

Rule 1.5(a)(4) again reflects consideration of risk and reward. A lawyer who undertakes a representation in which a large amount of money is involved is, in effect, taking on additional risk because, if the client becomes dissatisfied and sues the lawyer, the amount at stake will be larger. This is particularly relevant to the amount of malpractice insurance a lawyer may carry. One can imagine a situation in which a lawyer might be asked to take on a case where the amounts involved may be greater than the malpractice insurance coverage the lawyer has. In such a case, a lawyer may make the decision either to increase her malpractice coverage, if possible. She may pass this additional cost for the increased coverage, or the increased risk for not increasing coverage, to her client through a higher fee.

Rule 1.5(a)(5)

Rule 1.5(a)(5) reflects both risk and, perhaps, inconvenience in that it states that time limitations imposed by a client or the circumstances of a particular matter are to be considered in determining a fee. When a lawyer has significant time restraints to complete a matter, this may require that she work longer than normal hours under increased stress. This situation may well raise the risk that she will make an error which could lead to liability. (Of course, if a lawyer believes that she cannot perform her tasks adequately under the proposed time restraints, she should decline the representation under Rule 1.1. This is a situation which has arisen in cases involving public defenders who have caseloads which put impossible conditions upon representation of clients). A second consideration under Rule 1.5(a)(5) is that significant time constraints, the necessity to work long hours, and the stress that may cause will have a negative effect upon a lawyer's physical and mental health. Here, again, fairness would require that a lawyer be permitted to charge a higher fee to recompense her for this.

Rule 1.5(a)(6)

Rule 1.5(a)(6) looks to the relationship between the client and the lawyer. A lawyer may well decide to charge a long-time client who provides steady business a lower fee than she would charge a new client who might not employ the lawyer again. In effect, Rule 1.5(a)(6) permits a lawyer to provide a "volume" or "preferred customer discount" to regular clients. If a new client were to complain that a lawyer charged a different, lower fee to a long-time client, Rule 1.5(a)(6) provides an explicit justification for doing so.

Rule 1.5(a)(7)

Rule 1.5(a)(7) provides something of an overlap with Rule 1.5(a)(1) in that

experience, reputation, and ability are closely related to—if not at times synonymous with—skill. These two factors not only permit more experienced and expert lawyers to charge more for their services, but, also, place a limitation on what a less experienced and able lawyer may be permitted to charge. For example, we may hypothesize a lawyer with five years' experience who does estate planning. He may charge $500/hour, which is the same amount a lawyer who has twenty-five years' experience and an advanced degree in the field charges. While the less experienced lawyer may well be more than competent in the field, the more experienced lawyer may know techniques and estate planning structures unknown to the less experienced lawyer. Thus, the more experienced lawyer with more experience may well offer more planning options to the benefit of the client. In such a case, the less experienced lawyer may find that Rule 1.5(a)(7) casts doubt in the reasonableness of his charging as much as the more experienced and higher educated lawyer.

Rule 1.5(a)(7) also states that the reputation of a lawyer is to be considered in setting and calculating the fairness of a fee. One can imagine some situations in which a lawyer's reputation will give a client an advantage. For instance, one lawyer who specialized in hostile corporate takeover legislation was known for promoting his services to clients by suggesting that if they retained him as counsel to defend against potential hostile takeovers, corporations that might be tempted to launch a hostile takeover against them would hesitate to do so because they knew the target's lawyer had a reputation for aggressive defense tactics that often led takeover attempts to fail.

Rule 1.5(a)(8)

Rule 1.5(a)(8) states that the nature of the fee—whether it is a fixed fee or a contingent fee—will also be a factor to be considered in determining the fee's reasonableness. Contingent fees carry a higher risk than fixed fees for lawyers, since the very nature of a contingent fee means that a lawyer will only receive a fee if she wins the case. Loss of the case means that the lawyer will receive nothing. As noted earlier in this article, the notion that higher risk justifies a higher reward clearly means that lawyers who take on contingent fee cases may end up with a significantly higher fee than if they had charged a fixed fee if they win a case. There is a substantial amount of case law dealing with this situation. Clients and judges are often uncomfortable with the amount of a particular contingent fee. This may be especially true when a contingent fee case might settle for a large amount after a short period when the lawyer has not spent a great deal of time or effort on the case.

New Authority

Useful References on Legal Fees

This month's LEMR "authority" feature provides a select list of useful references to accompany the lead article's focus on legal fees.

Books:

1. M. Hoeflich, C. Steadham, S. Valdez, "Ethical Concerns Regarding Fees and Billing," in N. Badgerow, *Kansas Ethics Handbook* (3rd ed. 2015), chap. 7.
2. Robert Rossi, *Attorney's Fees* (3rd ed., 2012)
3. Alba Conte, *Attorney Fee Awards* (3rd ed., 2010) (continuing subscription available online at https://store.legal.thomsonreuters.com/law-products/Treatises/Attorney-Fee-Awards-3d-Trial-Practice-Series/p/100002053).

A useful fee survey:

PWC's 2022 BRASS Survey (Billing Rate & Associate Salary Survey) is available to paid subscribers at https://store.legal.thomsonreuters.com/law-products/Treatises/Attorney-Fee-Awards-3d-Trial-Practice-Series/p/100002053.

An excellent free online outline on fee litigation:

Eric Magnuson & Patricia Furlong, "Litigating Attorneys' Fee Claims—Proving Reasonableness and Rates of Attorneys' Fees and Costs," available online at https://www.robinskaplan.com/-/media/pdfs/litigating-attorneys-fees-clefinal.pdf.

A useful Kansas case:

Westar Energy, Inc. v. Wittig, 44 Kan. App. 2d 182, 206, 235 P.3d 515 (2010), available at https://casetext.com/case/westar-energy-inc-v-wittig.

ETHICS & MALPRACTICE RESEARCH TIP

New Articles Drawn from *The Current Index of Legal Periodicals*

1. Patrick Emery Longan, "Legal Ethics," Annual Survey of Georgia Law, 73 Mercer L. Rev. 155 (2021).

   This is a useful survey.

2. Joshua E. Kastenberg, "Judicial Ethics in the Confluence of National Security and Political Ideology: William Howard Taft and the 'Teapot Dome' Oil Scandal as a Case Study for the Post-Trump Era," 53 St. Mary's L.J. 55 (2021).

   This is a fascinating historical take on a persistent issue.

3. James L. Kimbler, "Should Ohio Adopt the ABA Model Code 8.4(g) to Confront Racism in the Profession?" 44th Annual Symposium: The Impact of Race on a Criminal Case, 47 Ohio N.U. L. Rev. 547 (2021).

   Although this article focuses on Ohio, the discussion is relevant for every state.

4. Raymond H. Brescia, "Ethics in Pandemics: The Lawyer for the (Crisis) Situation," 34 Geo. J. Legal Ethics 295 (2021).

   The pandemic is *not* over. This is a timely guide for the present day.

5. Alex B. Long, "Of Prosecutors and Prejudice (or 'Do Prosecutors Have an Ethical Obligation Not to Say Racist Stuff on Social Media?'), 55 UC Davis L. Rev. 1717 (2022).

   This is an important discussion of critical issues facing us all.

Blast from the Past

A Comparison of Kansas and Missouri Attorney Ethics Statutes from 1820–1855

Both Kansas and Missouri adopted modest regulatory schemes for lawyer misconduct early in their histories. Indeed, the first such statute in Kansas, adopted by the so-called "Bogus Legislature" during the territorial period in the summer of 1855, was based upon the analogous chapter in the Missouri Revised Statutes of 1845 (which dated back to the first Missouri Statutes of 1820 as revised in 1824). The relevant provision in the Kansas Statutes of 1855 reads:

> Any attorney or counsellor at law who shall be guilty of any felony or infamous crime, or improperly retaining his client's money, or of any malpractice, deceit or misdemeanor in his professional capacity, may be removed or suspended from practice, upon charge exhibited and proceedings thereon had, as herein provided.[1]

The relevant provision in the 1825 Revised Missouri Statutes reads:

> Be it further enacted,
>
> That the supreme court shall have power to strike from the rolls any attorney who shall have been convicted of felony, or guilty of improperly retaining a client's money after demand made by the client for the same, malpractice in his office, gross ignorance, or neglect of duty, or contempt of court; and any person stricken from the roll of the supreme court shall be prohibited from practising in any other court, the same as if he had never been licensed.[2]

A close comparison of the two provisions shows several differences between the two statutes. Most interesting—and, perhaps, entertaining—is that the Kansas statutes omitted "gross ignorance" as a ground for discipline as contained in the earlier Missouri statutory provision.

1 *The Statutes for the Territory of Kansas* (1855), chap. 11, p. 132.
2 *The Revised Statutes of the State of Missouri* (1825), vol. 1, p. 159.

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