

ARIZONA SUPREME COURT PROBATE OVERSIGHT COMMITTEE

Workgroup Three – Fee Guidelines, Fee Awards and Fee Dispute Resolution

Workgroup Members:

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INTRODUCTION

The administration of cases in Probate Court frequently involves the management of estates for vulnerable adults and minors. Accordingly, the probate court should inspire trust and confidence that its functions are conducted expeditiously and fairly and that the court's decisions have integrity. [*National Probate Court Standards, Standard 1.5.2, Expeditious, Fair and Reliable Court Functions, page 23.*]

The need for public trust and confidence in the court's functions is driven in part by the vulnerable nature of many of the individuals affected by or dependent upon the court's services. For example, the respondents in guardianship or conservatorship proceedings may be persons with a mental or physical disability. Similarly, the processing of decedents' estates may occur at a time of emotional vulnerability for various family members or may directly affect individuals of limited fiscal insight, including minors. Public respect for the court will be enhanced in part by perceptions that such individuals are treated fairly and their matters are handled efficiently and expeditiously. [*National Probate Court Standards, Standard 1.5.2, Expeditious, Fair and Reliable Court Functions, page 23.*]

Arizona law and due process requirements mandate that an attorney be appointed to represent any adult for whom a guardianship or conservatorship appointment is sought.¹ In many instances, the petition seeking appointment of a guardian or conservator nominates a licensed fiduciary to serve in this capacity. Court-appointed attorneys and licensed fiduciaries are entitled to be reasonably compensated for the services they provide on behalf of the ward or protected person and such fees applications must be submitted to the probate court for approval. [Arizona Rules of Probate Procedure, Rule 33, Compensation for Fiduciaries and Attorney’s Fees.] For the purposes of this Workgroup’s report, the guidelines for attorneys’ fees will be applicable to any attorney involved in the Title 14 case whose fees are sought to be paid from estate funds, including a court-appointed attorney, a guardian ad litem, or the fiduciary’s attorney.

¹ See A.R.S. §§ 14-5303(C), 14-5310(C), 14-5401.01(C), and 14-5707.

The Arizona Supreme Court has directed that the Committee on Improving Judicial Oversight and Processing of Probate Court Matters address the development of fiduciary and attorney fee guidelines that will “assist judicial officers in determining the reasonableness of fees charged.” [Administrative Order No. 2010-52, page 2.] In addition, the Committee is required to “make recommendations on a process for reviewing and awarding fees and, where a dispute regarding the fees arises, alternative dispute resolution options that provide timely and less costly resolution of the fee dispute.” [*Id.*]

The development and implementation of fee guidelines and procedures for resolving fee disputes and controversies, will improve public trust and confidence in the court’s oversight of probate cases, will enhance the perception that vulnerable persons and estates are being adequately protected, and will ensure that individuals are being treated fairly and their matters handled efficiently and expeditiously.

GUIDELINES FOR APPROVAL OF ATTORNEY FEE APPLICATIONS IN GUARDIANSHIP AND CONSERVATORSHIP MATTERS

NOTE: As of the date of this Interim Report, the development of guidelines for attorneys’ fees is still in progress. At the Workgroup 3 meeting on August 27, 2010, Judge Mroz tasked attorneys Michael Strauber [Maricopa County] and Jonathan Reich [Pima County] with reviewing the draft guidelines that were previously discussed at the July 30, 2010 meeting, and requested their input on proposed changes to this draft, or for the presentation of an alternative draft proposal, for discussion in subsequent Workgroup 3 meetings. In addition, member Mark Salem was tasked to work jointly with attorneys Strauber and Reich on their proposed revisions or alternatives, or to submit his own separate fee guidelines proposal for consideration. Below is the current draft of the attorneys’ fee guidelines.

Purpose: The court recognizes that the determination of attorney’s fees is a sensitive matter. Adequate compensation is important to attract and enable competent lawyers to work in the probate field. At the same time, the public must be satisfied that fees are rationally determined and represent fair value for the services performed.

The Court intends for these Guidelines to assist attorneys in drafting their fee applications in guardianship and conservatorship cases. The Guidelines provide standards that the Court should use in evaluating fee applications. However, they are not absolute rules. The Court may make exceptions in particular circumstances as fairness and justice demand.

I. Attorney’s Fees

It is the Court’s duty to ensure that estates of the wards² pay only “reasonable” attorney’s fees.³ The factors to be considered in determining the reasonableness of attorney’s fees are

² For ease of reference, the term “ward” includes “protected person,” and “ward” as defined in A.R.S. § 14-5101.

set forth in the Arizona Rules of Professional Conduct, E.R. 1.5(a), and the comments to Probate Rule 33. They include the following factors:

1. the time and labor required;
2. the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
3. the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
4. the fee customarily charged in the locality for similar legal services;
5. the amount involved and the results obtained;
6. the time limitations imposed by the client or by the circumstances;
7. the nature and length of the professional relationship with the client;
8. the experience, reputation, and ability of the lawyer or lawyers performing the services; and
9. the degree of risk assumed by the lawyer.

Time expended will not be the exclusive criterion for determining fees. The court will consider approving fees in excess of time expended where the fee is justified by the responsibility undertaken, the results achieved, the difficulty of the task, and the size of the matter. Conversely, a mere record of time expended will not warrant an award of fees in excess of the worth of the services performed.

In determining whether a rate charged is reasonable, the court may also consider the following:

1. the customary rates⁴ in the county where the litigation takes place;
2. whether the matter is particularly difficult requiring special expertise;

³ A.R.S. §§ 14-5314 and 14-5414.

⁴ See *Economics of Law Practice in Arizona, 2007*, published by the State Bar of Arizona, and attached Appendix A. The data in Appendix A will be subsequently updated with information contained the newly-released *Economics of Law Practice in Arizona, 2010*. NOTE: All information contained in Appendix A was based on data from Table 24 (2007 Hourly Billing Rates by Firm Size, Years in Practice and Office Location), except for the “new, no experience” category. Figures for the “new, no experience” category came from Table 26 (2007 Hourly Billing Rates for Associates and Legal Assistants by Years of Experience).

3. whether the amount charged by the attorney on a particular matter far exceeds the amount reasonably charged by attorneys in similar matters with similar level of experience;
4. whether the estate is so small that the requested fee would consume most of the estate. In these instances, a good practice for the attorney is to petition the court for approval in advance of performing the work.

II. Fees When An Attorney Is Also The Fiduciary

The attorney-fiduciary must keep meticulous time and expense records, carefully segregating legal work and fiduciary work. An attorney-fiduciary may seek attorney's fees *only for legal services*. Applications for attorney's fees should give a detailed account of both the legal services and fiduciary services he or she rendered to the estate. Attorney-fiduciaries will not be paid attorney's fees for *fiduciary services*.

Example: the attorney-fiduciary will not be paid at the Court-approved attorney-fee rate for obtaining a bond, gathering estate assets, or making health care decisions for a ward of the Court.

III. Paralegal/Legal Assistant ("Legal Assistant") Charges

The Court recognizes that many attorneys rely on legal assistants for gathering information and reviewing and preparing documents, and that the use of legal assistants can significantly reduce the cost of overall services to the ward's estate. The Court will not pay for clerical services at the legal assistant rate *even if such services are performed by legal assistants*. It is the Court's position that secretarial services are included in the attorney's overhead, for which an attorney is reimbursed at his or her hourly rate.

IV. Pre-Approval Requirements

The Court may require that an estate management plan or case management plan be filed in the case. The court may order the fiduciary to provide a budget with an estimate of the anticipated attorney's fees to be incurred during next accounting period. If the attorney believes that more fees may be incurred in any given year than the fiduciary has budgeted, the attorney should notify the court and detail the reasons why the fees may be more than the budgeted amount or risk not getting the fees in excess of the budgeted amount approved at a later date.

Once the court is notified of the reasons for the fees being more than the budgeted amount, the court may choose to take no action or set a hearing for further explanation.

IV. Time for Billing

(If there is a statutory/rule change): Attorneys shall submit fee applications at least once a year. All fee requests submitted to the Court more than one year after the services were performed will not be approved.

(If there is not a statutory/rule change): The Court prefers that all bills be submitted at least once a year. All fee requests submitted to the Court more than one year after the services were performed may not be approved depending on the circumstances.

All fee applications shall comply with Rule 33 of the Arizona Rules of Probate Procedure. It is insufficient to provide the Court with broad summaries of the work done and the time incurred.⁵

All fee applications shall also include the most recent total value of the estate, the total value of the estate at the inception of the conservatorship, and the total amount of attorney's fees already paid by the estate to the applicant from the inception of the conservatorship.

V. Guidelines for Specific Types of Charges

The Court will not reimburse costs based on a fixed percentage of the attorney's billable rate to cover administrative and overhead costs such as photocopies, faxes, and delivery charges. The Court will only reimburse based on actual costs, as discussed below.

A. Travel

Travel time from an attorney's office to the courthouse to attend hearings, or to a client's location will be reimbursed at half of the attorney's approved rate. The Court encourages the attorneys to request telephonic conferences whenever possible.

The Court does not ordinarily reimburse for an attorney's or staff member's travel mileage or expenses inside the county where the attorney has an office. If the attorney or staff member travels outside the county where he has an office, the Court will reimburse mileage at the current I.R.S. rate.⁶

B. Legal Research

The Court considers the contract costs of computerized legal research (such as Westlaw and Lexis) to be part of an attorney's overhead, as are the costs of a hard-copy library. Consequently, the Court will not reimburse for those costs.

⁵ *Schweiger v. China Doll Restaurant, Inc.*, 38 Ariz. 183, 673 P.2d 927 (App. 1983).

⁶ Current rate can be obtained at <http://www.irs.gov/newsroom/article/0,,id=216048,00.html>. For 2010, the reimbursement rate per mile is fifty cents (\$.50).

C. Preparation of Attorney's Fee Petitions

The Court considers the cost of generating and reviewing billing invoices and of drafting and mailing the cover letters that accompanies the invoices, including Probate Rule 33 Attorney's Fee Petitions, to be part of an attorney's overhead. Consequently, the Court will not reimburse attorneys for the costs of preparing invoices, fee applications and orders that accompany them.

The Court will consider awarding the reasonable fees and costs if the attorney's fee application is contested and the Court finds by clear and convincing evidence that the objection is done for the purpose of harassment, is groundless, and is not made in good faith.⁷ In those instances, the attorney's fees and costs for defending the fee application may be assessed against the objecting party rather than the estate.

D. Copies and Faxes

The Court will reimburse attorneys the actual cost of the copies, up to a maximum of ten cents (\$.10) per page.⁸ Copies made by the Clerk's office will be reimbursed at the rate charged by the Clerk⁹ if the fee petition indicates this fact. The Court will pay copying costs only if it is accompanied by a statement of the charge per page and the number of copies.

The Court considers faxes as a part of an attorney's overhead. Therefore, the Court will not pay for facsimile transmissions. It will, however, pay the long-distance charges associated with long-distance faxes in the same manner it reimburses long-distance phone calls.

E. Deliveries

The Court discourages the routine use of hand-delivery services because it results in significant expense to the estate. To minimize the costs to estates arising from excessive delivery charges, the Court encourages the use of first-class mail, certified mail, faxes, and e-mail. In situations where hand delivery is necessary, the Court will approve the actual cost of hand delivery up to \$15, regardless of whether an attorney, paralegal, secretary, or commercial courier service actually delivered the document.

⁷ Language is based on A.R.S. § 12-341.01.

⁸ The Kinko's copy center in downtown Phoenix charges \$.10 per page for standard copying without a volume discount.

⁹ The Clerk's Office in Maricopa County charges fifty cents (\$.50) per page.

VI. Fees and Costs Necessitated by Misfeasance or Malfeasance

(If there is no statutory/rule change for fee shifting): The Court will not reimburse for attorneys' fees and costs out of the ward's estate for resolving problems or attending hearings necessitated by the misfeasance or the malfeasance of the client or the attorney. For instance, if a fiduciary sells property without Court approval and there are attendant costs associated with rectifying the situation, the Court believes the fiduciary should be personally responsible for any added expense. Likewise, order to show cause hearings fall within this exception, and the attorney or the client will be responsible for all costs associated with attendance at the hearing.

Appendix A: Approved Fees Rate Range

NOTE: The rates referenced in this table reflect fees charged for all practice areas and are not specific to probate, or specific by county of practice, but are included here for illustrative reference purposes reflecting generally what the applicable rates are. [See *Economics of Law Practice in Arizona, 2007*, published by the State Bar of Arizona. The data in Appendix A will be subsequently updated with information contained the newly-released *Economics of Law Practice in Arizona, 2010*.]

Approved Attorney's Fees Rate Range

Yrs of Practice	Approved Rate Range	Median Rate
New, no experience	\$135 - \$175	\$150
1 – 2 years	\$165 - \$200	\$185
3 – 5 years	\$160 - \$220	\$190
6 – 10 years	\$175 - \$263	\$200
11 – 15 years	\$200 - \$250	\$240
16 – 25 years	\$200 - \$275	\$250
26+ years	\$200 - \$325	\$275

Approved Paralegal/Legal Assistant's Fees Rate Range

Yrs of Practice	Approved Rate Range	Median Rate
New, no experience	\$60 - \$91	\$78
1 – 4 years	\$75 - \$109	\$90
5 – 9 years	\$85 - \$125	\$100
10+ years	\$90 - \$125	\$100

Appendix B: Summary of Attorney's Fees Guidelines

Item	Amount Paid
Attorney's fee petition preparation	Not billable.
Copies	Actual cost up to maximum of \$.10 per page. Copies made by Clerk's office reimbursed at rate charged by the Clerk
Deliveries	Actual cost up to maximum of \$15
Faxes	Not reimbursable.
Fiduciary services performed by attorney	Billable at fiduciary rate only.
Legal research (i.e.: Westlaw/Lexis/books)	Not reimbursable.
Mileage or travel expenses	Inside the county: not reimbursable. Outside the county: reimbursed at the current I.R.S. rate.
Secretarial services	Not billable.
Travel time	Billable at half of the approved rate.

GUIDELINES FOR FIDUCIARIES' FEES

NOTE: As of the date of this Interim Report, the development of guidelines for fiduciaries' fees is still in progress. At the Workgroup 3 meeting on August 27, 2010, Judge Mroz charged Diana Clarke [Probate Counsel, Maricopa County] with further research of this issue, and requested that an alternative proposal for fiduciary fee guidelines be submitted for review and discussion in subsequent Workgroup 3 meetings, so that alternative approaches could be considered. Below is the current draft of the fiduciaries' fee guidelines.

Introduction

Licensed fiduciaries have a range and degree of responsibility found in few other professions. Because the services fiduciaries provide must be tailored to the needs of the individuals they serve, a "cookie-cutter" regulatory approach to the fees fiduciaries may charge is not practical. Requiring the use of predetermined times to perform specific tasks would result in overcharges in less complicated cases and would place too large an economic burden on the fiduciary obligated to perform the task. While there is no case law discussing the latter, lessons from attorney discipline cases are analogous to the fiduciary practice. See: Arizona Ethics Opinion 01-06; Ariz. Op. 99-08.

Caselaw has adopted a case-by-case approach to the review of fiduciary's fees. *In re Estate of Gordon*, 87 P.3d 89, 207 Ariz. 401 (Ariz.App.Div.1 03/30/2004). The statutes and applicable regulations require fees by fiduciaries must be reasonable and necessary. Ariz. Rev. Stat. Sec. 14-3719, 14-5314, 14-5414; and 14-10805; Standards 4i and 5a, Fiduciary Code of Conduct. See also: *In re Smith's Estate*, 131 Ariz. 190, 639 P.2d 380 (1981).

Case law has expanded the statutes to allow Courts to consider both the fiduciary's and the estate's circumstances in determining reasonableness and necessity.

The unique circumstances of the fiduciary and the beneficiaries of the estate managed by the fiduciary relationship places the burden of reasonableness on the fiduciary to be efficient, but thorough, in the amount of time spent on specific tasks and avoiding duplication of effort.

Therefore in order for courts, counsel, fiduciaries and other interested persons to have a common starting point from which to evaluate the reasonableness and necessity of the fiduciary fees, the following guidelines have been proposed.

These are guidelines in nature only. The Court, in its discretion, may assign more or less weight to any factor listed below:

1. The fiduciary shall comply with the provisions of Rule 33, Uniform Rules of Probate Procedure in submitting a request for fee approval.
2. The fiduciary may submit a fee schedule when appropriate to obtain prior approval of the rates to be charged.
 - a. The fiduciary may submit a fee schedule to the Court and all persons entitled to notice pursuant to Ariz. Rev. Stat. Sec.14-1401, 14-3204, 14-3306, 14-3403, 14-5207, 14-5309, 14-5310, 14-5405, 14-10813, in conjunction with the filing of a temporary or permanent petition to appoint the fiduciary in the case, or as soon thereafter as possible. Such fee schedule may be attached as an exhibit to the petition to appoint the fiduciary.
 - b. If the fiduciary is appointed, this initial fee schedule shall be presumed by the Court to be a reasonable rate and will remain in effect until a revised fees schedule is submitted by the fiduciary.
 - c. If any interested party objects to this schedule, the Court shall, after hearing and testimony, exercise its discretion and accept or reject or modify the scheduled rates.
 - i. Should the Court reject the scheduled rates, the fiduciary may

notify the Court the fiduciary chooses not to accept the appointment. If the fiduciary notifies the court the fiduciary chooses not to accept the appointment, the fiduciary shall be allowed to petition the Court for approval of fees and costs of both the fiduciary and the fiduciary's attorney for pursuit of the petition pursuant to Rule 33, Ariz. Rules of Proc. Proc.

- ii. An "objection" is defined as the filing of an objection as described in 17B A.R.S. Rules Probate Proc, Rule 27
- d. The fee schedule must list and define all rates or percentages the fiduciary intends to charge whether it is for work performed by the fiduciary or by the fiduciary's staff, and shall include whether the fiduciary intends to seek reimbursement for specific costs such as mileage, copies, faxes, etc as well as any flat fees or surcharges applied.
- e. The approved initial fee schedule shall constitute the rates the fiduciary is allowed to charge until further order of the Court.
- f. The fiduciary may, but is not required to, submit a revised fee schedule no more often than annually. The revised fee schedule may be submitted in conjunction with the filing of any annual accounting in a conservatorship or court supervised trust, with the filing of the annual guardian's report in a guardianship and no more often than annually in any probate action, special administration or other matter. If the fiduciary does not submit a revised fee schedule, the fiduciary shall continue to charge rates of no more than those approved in the initial fee schedule.
- g. If the fiduciary submits a revised fee schedule, the fiduciary shall give notice to all parties in the matter of the proposed rate change and a non-appearance hearing regarding the proposed rate change must be set.
- h. If there are no objections to the proposed rate change, the Court may enter an order accepting or rejecting or modifying the proposed rate schedule. Thereafter, the rate schedule approved by the Court shall be presumed by the Court to be a reasonable rate.
- i. If any party to whom notice was given objects to this schedule, the Court shall, after hearing and testimony, exercise its discretion and accept or reject or modify the scheduled rates.
 - i. Should the Court reject or modify the revised scheduled rates, the fiduciary shall continue charging fees at the previously approved

rates. The fiduciary may, but is not required, to tender a resignation. Until a successor fiduciary is appointed, the fiduciary shall continue to serve the ward's interests as required until further order of the Court.

- ii. An "objection" is defined as the filing of an objection as described in 17B A.R.S. Rules Probate Proc;, Rule 27.
 - j. Nothing in these guidelines shall prevent fiduciaries from charging less than approved rates.
3. Fiduciaries are allowed and shall hereby be encouraged to utilize the services of their staff and outside contractors when doing so will result in a lesser charge to the estate if such services are available.
4. The time charges and rates charged by the fiduciary and the fiduciary's staff must be reasonable and necessary. In determining the reasonableness, the Court may consider the following factors:
- a. Experience, training and expertise of the fiduciary and/or the fiduciary's staff
 - b. Type of services being provided taking into consideration whether:
 - i. The fiduciary code of conduct requires that only a licensed fiduciary perform this service;
 - ii. A non-licensed staff member could perform the same level of service at a lesser rate (such as routine matters like paying bills);
 - iii. The service being provided is mandated by statute, fiduciary regulation, court order or other applicable regulation;
 - iv. The service being provided is as the result of an emergency situation, was extraordinary or potentially dangerous in nature;
 - v. The service being provided was performed at times other than normal business hours;
 - vi. The fiduciary utilized special skills or licensing in performing this task;
 - vii. The time and/or physical labor required;

- viii. The novelty and difficulty of the tasks involved;
- ix. Whether the fiduciary's acceptance of the particular employment in this matter precluded other employment by the fiduciary;
- x. The value, extent and type of the assets to be managed;
- xi. Any difficulties the fiduciary had in marshalling, inventorying or managing the assets;
- xii. The results obtained by the fiduciary;
- xiii. The benefits derived by the estate, trust, ward, protected person or beneficiaries;
- xiv. Any time limitations imposed by the circumstances, the Court or any parties;
- xv. Any financial limitations imposed by the circumstances, the Court or any parties which impeded the fiduciary's performance of his/her duties;
- xvi. Any other limitations imposed by the circumstances, the Court or any parties which impeded the fiduciary's performance of his/her duties;
- xvii. Whether the ward or protected person suffered any medical or psychological events during the accounting period which might have necessitated additional services;
- xviii. The nature and length of the professional relationship with the ward and/or protected person or the estate (typically there are more costs earlier in the case);
- xix. The degree of risk assumed by the fiduciary;
- xx. The same type and quality service could have been provided by a contractor at a lesser rate *and* such a contractor was available;
- xxi. Whether the service provided by the fiduciary was available in the community or had to be performed by the fiduciary (i.e. transporting clients to appointments in rural areas);
- xxii. Whether the service provided is generally considered part of the

fiduciaries normal rate as an overhead charge (i.e. clerical time to photocopy routine letter drafted by fiduciary is not compensable separately from fiduciary charge to draft letter);

- xxiii. Whether the fiduciary was involved in litigation in the matter; who brought the litigation, the type of litigation, and the results of the litigation;
 - xxiv. Whether the rates charged by the fiduciary have been previously approved by the Court in other matters.
- c. Rates charged within the community.
 - d. Any other fact the Court deems relevant.
5. The Court shall consider whether there are any other sources of payment available for the fiduciaries' fees and costs and shall enter such orders as are appropriate under the circumstances.
 6. The reimbursement sought by the fiduciary for out of pocket costs or reimbursable expenses must be reasonable and necessary. In determining the reasonableness, the Court may consider if the rate for mileage, photocopies, and the like equals or is less than that charged or approved by governmental entities (i.e. Mileage rate equal to that approved by the IRS; photocopy rate same or less than charged by the Court). If the rates are commensurate, there is a presumption of reasonableness.
 7. The payment by the fiduciary for filing fees, bonds, certified copies of letters of appointment or administration, birth certificates, death certificates, copies of military records and the like shall be presumed reasonable and necessary.
 8. The payment by the fiduciary for any court-ordered goods or services shall be presumed reasonable and necessary with the exception of attorney's fees which shall be subject to Rule 33 and other guidelines.
 9. The fiduciary shall not "mark-up" payments for costs as postage, filing fees, certified copies, and bonds, or payments to outside contractors.
 10. The fiduciary shall not charge interest for unpaid bills or reimbursement of costs unless prior approval from the Court has been obtained.
 11. The fiduciary shall not charge the estate for the fiduciary and staff's time to defend an AOC complaint or complaint to any other regulatory agency. This prohibition shall *not* apply to complaints or objections filed in Court against the

fiduciary. The Court shall review the fees and costs charged by a fiduciary in defense of a complaint or objection filed in Court using the same guidelines above as for fees and costs of other work performed by the fiduciary. Nothing in this section shall prevent a fiduciary from offering evidence in a fiduciary fee dispute regarding the fiduciary's defense of an AOC or other regulatory agency complaint if such evidence is allowable under the Arizona Rules of Evidence.

12. The Court, for good cause shown, may deviate from these guidelines. No such deviation shall occur without prior notice to the fiduciary and all other interested persons and giving them an opportunity to present evidence and be heard.

PROPOSED ADDITIONS TO ARIZONA RULES OF PROBATE PROCEDURE REGARDING FEE GUIDELINES

NOTE: Although the proposed rule regarding fee guidelines has been submitted to Workgroup 3 members for comment, as of this Interim Report it has not been addressed in discussion by the Workgroup. Pending input and discussion at future Workgroup 3 meetings, the draft that appears below is subject to further revisions.

Attorney and Fiduciary Fee Guidelines

A. Background:

Arizona and federal anti-trust laws prohibit price fixing.¹⁰ Fee schedules are considered to be a form of price fixing.¹¹ However, the actions of a state are exempt from the restraints of anti-trust law.¹² Courts have developed a standard for state action anti-trust exclusion. The restraint must be clearly articulated, affirmatively expressed as state policy, and be actively supervised by the State.¹³ Similarly, the U.S. Supreme Court upheld an advertising ban mandated by the Arizona Supreme Court.¹⁴ The Court found that the State Supreme Court is the "ultimate body wielding the State's power over the practice of law" and therefore the restraints embodied in its Rules are "compelled by direction of the State acting as a sovereign."¹⁵ As, "[t]he Arizona Supreme Court is the real party in interest; it adopted the rules, and it is the ultimate trier of fact and law in the enforcement process," the Court's rules clearly fulfill the standards required for state action.¹⁶ Thus, fee guidelines adopted either by

¹⁰ Northern Pac. Ry. Co. v. U.S., 356 U.S. 1, 5 (1958) (price fixing is a de facto violation of anti-trust law).

¹¹ Estate of Effron v. Koslow, 117 Cal. App. 3d 915, 923 (1981).

¹² Parker v. Brown, 317 U.S. 341 (1943)(purpose of anti-trust law was not to "restrain a state or its officers or agents from activities directed by its legislature").

¹³ Estate of Effron, 117 Cal. App. 3d at 923 (California's statutory fee limits do not violate anti-trust laws because it fulfilled the state action requirements).

¹⁴ Bates v. State of Arizona, 433 U.S. 350 (1977)

¹⁵ Id. at 360 (internal citations omitted).

¹⁶ Id. at 361, 363.

the legislature or by the Arizona Supreme Court would be exempt from anti-trust challenge under the state action exemption.

B. Proposed Arizona Supreme Court Rule for Fee Guidelines:

1. In guardianship and conservatorship cases, the Supreme Court may set attorney and fiduciary fee guidelines to provide standards for evaluating what constitutes reasonable fees for attorneys and fiduciaries. The court has the ultimate responsibility to determine the reasonableness of the fiduciary's and attorney's compensation.
2. A fiduciary's compensation and attorney's fees must be approved by the court **prior to fees being paid.**

PROPOSAL FOR RECOMMENDATIONS ON COURT REVIEW AND APPROVAL OF FEE APPLICATIONS

Introduction:

Currently, the Rule 33, Arizona Rules of Probate Procedure governs requirements for fee applications by attorneys and fiduciaries. Typically, fee applications are filed and set for approval by the court on a non-appearance calendar. Unless the court receives an objection to the fee application prior to the schedule hearing date, the court will review the application for reasonableness and enter an order accordingly. Even in counties that have court-accountants to review annual accountings, fee applications are only reviewed by the assigned judicial officer prior to approval. In cases where court-appointed counsel for a ward or protected person remains on the case, that attorney would be expected to file any objection that attorney has to the application for fees by a fiduciary or the fiduciary's attorney.

This Workgroup will be reviewing the current process for the court-approval of fee applications and will make proposed recommendations to appropriate statutes or court rules, if warranted, to improve the present procedures.

Relevant Authorities for Review and Consideration:

1. National Probate Court Standards, Standard 3.1.5, Attorneys' and Fiduciaries' Compensation
 - (a) Attorneys and fiduciaries should receive reasonable compensation for the services performed.
 - (b) The probate court should determine the reasonableness of fees when a dispute arises that cannot be settled by the parties directly or by means of alternate dispute resolution. When appropriate, the court should review and determine the reasonableness of attorneys' and fiduciaries' compensation on its own motion.
2. Arizona Code of Judicial Administration, Sections 7-201 and 7-202

3. Rule 42, Arizona Rules of Professional Conduct, Rules of the Supreme Court of Arizona
4. Rule 33, Arizona Rules of Probate Procedure
5. A.R.S. § 14-5414, and A.R.S. § 14-5314, Compensation and expenses

STATUTORY PROVISIONS FOR REMEDYING ABUSIVE PRACTICES

NOTE: This draft incorporates revisions discussed at the August 27, 2010, Workgroup #3 meeting and is subject to further discussions and revisions in subsequent Workgroup meetings.

Remedies for Unreasonable or Abusive Conduct

A. Introduction

The purpose of a guardianship/conservatorship proceeding is to protect a person (the “subject person”) who, as a result of some type of physical or mental impairment, is unable to protect himself. Sometimes, however, the subject person’s estate is forced to incur attorney and fiduciary fees that do not directly benefit the subject person. This frequently occurs when a third party (i.e., someone other than the guardian/conservator or the subject person) takes an unreasonable position or unreasonable action. For example, a family member of the subject person may make unreasonable demands upon the fiduciary for information (e.g., daily telephone calls or weekly requests for accountings). Likewise, a person may initiate court proceedings solely or primarily to further the person’s personal interests rather than to benefit the subject person (such as when the person is motivated by a desire to preserve an inheritance or when a family member uses the protected person as a pawn in litigation against another family member, similar to when divorcing parents use their child to “get even” with one another). In such cases, the protected person’s estate typically bears the costs of the fiduciary’s time and expense (including the fiduciary’s attorney fees) to deal with such unreasonable third party actions/positions, even when the fiduciary prevails in litigation against the third party. While this result might seem to be unfair to the subject person (who did not cause the fees to be incurred), it is equally unfair to deny the fiduciary and the fiduciary’s attorney compensation for taking actions they legally were obligated to take. Workgroup #3 proposes adoption of the following statute and court rule to:

- Increase awareness of the consequences that will be imposed, and to provide a strong disincentive, for unreasonable demands, actions, and positions, and
- Remedy unreasonable or abusive conduct and practices, and

- Shift the monetary burden for such wrongful actions onto the party or attorney that has engaged in such conduct.

The statute sets forth the remedies, and the rule sets forth the procedure for seeking those remedies.

B. Proposed Statute

§ 14-XXXX. Remedies for Unreasonable or Abusive Conduct

A. If the court finds that a ward, a protected person, a decedent's estate, or a trust has incurred professional fees or expenses as a result of unreasonable or abusive conduct, the court shall order the person who engaged in such conduct to pay the ward, the protected person, the decedent's estate, or the trust for some or all of such fees and expenses as the court deems just under the circumstances. For purposes of this subsection, "person" includes a person serving as a fiduciary, a court-appointed attorney, and a representative.

B. In a guardianship or conservatorship case, if the court finds that a person has engaged in vexatious conduct, the court may do any combination of the following:

1. Order the person to pay the ward or the protected person for some or all of the professional fees and expenses incurred in connection with such litigation or in connection with responding to such unreasonable or excessive requests.

2. Order that the person is no longer entitled to notice of, and may not participate as a party in, any future proceedings concerning the ward or protected person brought under this title.

3. Order that the ward's or protected person's fiduciary, court-appointed attorney, or representative has no duty to respond to future requests made by the person for information concerning the ward or protected person and to future court filings made by such person.

C. Subsection B of this section shall not apply to any of the following:

1. A proceeding brought by or on behalf of the ward or protected person against another person when such other person defends the claim in good faith.

2. A proceeding brought in good faith by a person against a ward or protected person to establish a claim against the ward or protected person.

3. A proceeding brought in good faith by or against the ward's or the protected person's fiduciary or court-appointed attorney, including but not limited to a proceeding establish the fiduciary's or the court-appointed attorney's liability to the ward or protected person or entitlement to compensation.

D. Before making a request for a remedy under this section, a party shall, in writing, provide the offending person with notice of the party's intent to seek such remedy if the offending conduct is not terminated.

E. The remedies permitted under this section are remedial and not punitive and do not limit, and are not limited by, any other civil remedy or any other provision of law. The remedies permitted under this section should be made to mitigate the financial burden on a ward, a protected person, a decedent's estate, or a trust incurred as a result of unjustified court proceedings or unreasonable or excessive demands made upon a fiduciary, court-appointed attorney, or representative.

F. For purposes of this section:

1. "Court-appointed attorney" means an attorney appointed pursuant to § 14-5303(C), § 14-5310(C), § 14-5401.01(C), or § 14-5407(B).

2. "Fiduciary" means an agent under a durable power of attorney, an agent under a health care power of attorney, a guardian, a conservator, a personal representative, a trustee, a guardian ad litem, or a representative appointed pursuant to § 14-1408.

3. "Fiduciary fees and expenses" includes the fiduciary's attorney fees and expenses, as well as the fees of any other professionals hired by the fiduciary.

4. "Professional" means an accountant, an attorney, a fiduciary, a physician, a psychologist, a registered nurse, a representative, or an expert witness.

5. "Representative" means a person appointed pursuant to § 14-1408 and includes a guardian ad litem.

6. "Vexatious conduct" includes litigation solely or primarily for the purpose of harassing a fiduciary, a court-appointed attorney, or a representative; litigation solely or primarily to further the person's own interests rather than the interests of the ward or protected person; unreasonably expanding or delaying court proceedings; court actions brought or defended without substantial justification; engaging in abuse

of discovery; and a pattern of making unreasonable or excessive requests for information from a ward's or a protected person's fiduciary, court-appointed attorney, or representative.

C. Proposed Rule for Timing of Making Request for Remedy

Rule 33(G), Arizona Rules of Probate Procedure

G. Unless otherwise ordered by the court:

1. A request for an award of attorney fees and expenses made pursuant to A.R.S. § 14-XXXX shall not be subject to the requirements of Rule 54(g), Arizona Rules of Civil Procedure, and, instead, shall be governed by this rule.

2. In a conservatorship case, any party wishing to seek an award of fees and expenses under A.R.S. § 14-XXXXX shall make such a request not later than when the conservator files the conservator's annual accounting for the accounting period during which such fees and expenses were incurred. If the person against whom such award is sought is a party to the case, the request may be made in the petition for approval of the annual accounting; otherwise, the request shall be made in a separate petition.

3. In all other cases, any party wishing to seek an award of fees and expenses under A.R.S. § 14-XXXX shall make such a request not later than one year after such fees and expenses have been incurred. The request shall be made in a petition.

4. Any request for a remedy under A.R.S. § 14-XXXX shall be accompanied by a separate, sworn statement certifying that the party making such request has complied with A.R.S. § 14-XXXX(D).

D. Explanation for Proposed Statute and Rule

Arizona follows the "American rule," under which each party to a lawsuit pays that party's own attorney fees unless a specific statute, court rule, or contractual provisions provides otherwise. *See generally* State Bar of Arizona, *Arizona Attorneys' Fees Manual* § 2.2 (5th ed. 2010). Application of the American rule in probate cases can be inequitable because it can result in someone who was not a direct party to the litigation incurring substantial fiduciary and attorney fees regardless of that person's nominal role in the litigation.

The purpose of a guardianship/conservatorship proceeding is to protect a person (the "subject person") who, as a result of some type of physical or mental impairment, is unable to protect himself. Sometimes, however, the subject person's estate is forced to

incur attorney and fiduciary fees that do not directly benefit the subject person. This frequently occurs when a third party (i.e., someone other than the guardian/conservator or the subject person) takes an unreasonable position or unreasonable action. For example, a family member of the subject person may make unreasonable demands upon the fiduciary for information (e.g., daily telephone calls or weekly requests for accountings). Likewise, a person may initiate court proceedings solely or primarily to further the person's personal interests rather than to benefit the subject person (such as when the person is motivated by a desire to preserve an inheritance or when a family member uses the protected person as a pawn in litigation against another family member, similar to when divorcing parents use their child to "get even" with one another). In such cases, the protected person's estate typically bears the costs of the fiduciary's time and expense (including the fiduciary's attorney fees) to deal with such unreasonable third party actions/positions, even when the fiduciary prevails in litigation against the third party. While this result might seem to be unfair to the subject person (who did not cause the fees to be incurred), it is equally unfair to deny the fiduciary and the fiduciary's attorney compensation for taking actions they legally were obligated to take.

A similar type of issue can arise in connection with the administration of a decedent's estate or a trust. A beneficiary of the estate/trust may make unreasonable demands upon the personal representative/trustee, thereby causing the estate/trust to incur unnecessary fiduciary and attorney fees, which ultimately end up being borne by all the beneficiaries (through a reduced inheritance as a result of the fiduciary and attorney fees being paid "off the top" of the estate/trust).

One solution to these problems is to allow the court to order the offending party (i.e., the party that has taken the unreasonable position or made unreasonable demands) to reimburse the subject person's estate, the decedent's estate, or the trust for the fiduciary and attorney fees incurred to respond to the offending party's unreasonable demands or unreasonable positions taken in litigation. Such a fee-shifting statute could be used both to mitigate the burden of the expense of the litigation and to encourage interested persons (as that phrase is defined in Arizona Revised Statutes section 14-1201) to make a more careful analysis of the demands they make upon fiduciaries and the positions they take in litigation. *Cf.* Ariz. Rev. Stat. § 12-341.01(B) (describing purpose of A.R.S. § 12-341.01(A), which allows the court to award the prevailing party reasonable attorney fees in an action arising out of contract); State Bar of Arizona, *Arizona Attorneys' Fees Manual* § 2.2 (describing purposes of A.R.S. § 12-341.01(A)).

Another solution to these problems, particularly in guardianship/conservatorships cases, is to allow the court to order that the offending party is no longer entitled to notice of, and to participate in, future proceedings relating to the ward/protected person. To reduce the drain on the ward/protected person's assets caused by excessive demands on the fiduciary's or court-appointed attorney's

time, the court also should be permitted to order that the fiduciary or court-appointed attorney has no duty to respond to continuing requests made by persons who have engaged in a pattern of making excessive or unreasonable requests of the fiduciary or court-appointed attorney.

E. Notes

- Subsection A is very loosely based on A.R.S. § 25-324(A), which provides that the court, “from time to time, after considering the financial resources of both parties and the reasonableness of the positions each party has taken throughout the proceedings, may order a party to pay a reasonable amount to the other party for the costs and expenses of maintaining or defending any proceeding” under chapter * and chapter 4, article 1, of title 25.
- Subsection B is very loosely based on A.R.S. § 25-411(G), which requires the court to assess attorney fees and costs against a party who seeks modification of child custody “if the court finds that the modification action is vexatious and constitutes harassment.”
- Subsection E is very loosely based on A.R.S. § 12-341.01(B).
- Do we want to couch things in terms of an award of “reasonable” fees? I’m not sure this is necessary as: (a) I think “reasonable” is already implied, and (b) the proposed language gives the court the discretion to award “some or all of” the fees so the court can limit the awarded fees to only those that are reasonable.
- Review A.R.S. § 14-11004(B) to see whether it should be repealed or modified.
- Although the word *vexatious* is used in three statutes, I could not find a definition of the word in Arizona Revised Statutes or in any published Arizona appellate court case (a search for the word *vexatious* in Westlaw resulted in 77 cases). This suggests to me that courts are familiar enough with the term that a definition is not needed. However, if the Committee believes the term should be defined, *Black’s Law Dictionary* (6th ed. 1990) defines it as “[w]ithout reasonable or probable cause or excuse,” and defines *vexatious proceeding* as a “[p]roceeding instituted maliciously and without probable cause.” *Black’s* continues the definition of *vexatious proceeding* as follows: “Type of malicious prosecution differing principally because based on civil action exists when the party bringing proceeding is not acting *bona fide*, and merely wishes to annoy or embarrass his opponent, or when it is not calculated to lead to any practical result.”
- Paragraph D of the proposed statute and proposed Rule 33(G) are very loosely based on Rule 37(a)(2)(C), Arizona Rules of Civil Procedure.

PROCEDURES FOR FEE DISPUTE RESOLUTION

NOTE: Although the proposed statute to compel mandatory arbitration in fee disputes has been submitted to Workgroup 3 members for comment, as of this Interim Report it has not been addressed in discussion by the Workgroup. Pending input and discussion at future Workgroup 3 meetings, the draft that appears below is subject to further revisions.

Statute for Mandatory Arbitration of Fee Disputes

A. Explanation

If a dispute arises as to whether a fiduciary's fees or an attorney's fees are reasonable, the fees incurred to resolve such dispute through litigation often can exceed the amount of the disputed fees themselves. Moreover, under existing statutory and case law, fiduciaries and attorneys who are entitled to be compensated from a protected person's estate, a ward's estate, a decedent's estate, or a trust typically are entitled to have such estate pay their fees incurred in litigation regarding the fiduciary's or the attorney's fees. For these reasons, disputes regarding attorney and fiduciary fees often can become the proverbial tail that wags the dog. Consequently, a more cost-effective mechanism for resolving such fee disputes is needed.

Recognizing the costs of litigation can sometimes exceed the amount in controversy, Arizona law already mandates that certain superior court cases be submitted to arbitration. Specifically, Arizona Revised Statutes section 12-133 requires the superior court in each county to set a jurisdictional limit, not to exceed sixty-five thousand dollars, for mandatory arbitration of disputes. No good reason exists for not applying a similar requirement to the resolution of disputes regarding the reasonableness of attorney and fiduciary fees in probate matters.

B. Proposed Statute

§ 14-XXXX. Arbitration of Fiduciary and Attorney Fee Disputes

A. The superior court shall require arbitration of all disputes relating to the reasonableness of fiduciary fees and expenses and attorney fees and expenses where such fees and expenses in dispute do not exceed sixty-five thousand dollars.

B. The provisions of subsections (B) through (K) of § 12-133 shall apply to the arbitration of disputes relating to the reasonableness of fiduciary fees and expenses and attorney fees and expenses under this section.

C. For purposes of this section:

1. “Attorney” means an attorney appointed pursuant to § 14-5303(C) or § 14-5407(B), an attorney representing a fiduciary, or any other attorney who has been, or is seeking, compensation from a protected person’s estate, a ward’s estate, a decedent’s estate, or a trust.

2. A “dispute” occurs when a party has filed with the superior court a written objection to the fees charged by a fiduciary or attorney in connection with a proceeding brought pursuant to this title.

2. “Fiduciary” means an agent under a durable power of attorney, an agent under a health care power of attorney, a guardian, a conservator, a personal representative, a trustee, a guardian ad litem, or a representative appointed pursuant to § 14-1408.

C. Notes

- Subsection A is a modified version of A.R.S. section 12-133(A) and (B). The current cap for mandatory arbitration of disputes in general civil cases is currently \$65,000.00
- This statute is intended only to cover disputes concerning the reasonableness of fiduciary and attorney fees and, specifically, is not intended to cover disputes concerning the entitlement to fees. The reason for this distinction is that the entitlement to fees is generally a legal issue that typically can be (and should be) resolved fairly quickly by a judicial officer without the need for an evidentiary hearing. In contrast, the reasonableness of fees is a factual issue that typically requires an evidentiary hearing, which can be a time-consuming and expensive process. Consequently, this proposed statute is intended to avoid parties from incurring more in attorney fees than the amount of fees that are in dispute.
- The mandatory arbitration would apply to any fiduciary or attorney fees that are sought to be (or have been) paid from the estate of a ward, protected person, or decedent or from a trust, including, for example, the fees of a lawyer who represented a protected person or ward in connection with a personal injury claim.
- NOTE: We need to add to Probate Rule 33 a provision that when a party files an objection to another party’s fees, the objecting party also files a certificate of compulsory arbitration. Look at Civil Rule 72(e).
- NOTE: Add to arbitration statute that the arbitrator may award the fiduciary/attorney fees incurred in the arbitration.

STATUTORY PROVISION FOR TIME LIMITATION ON FEE APPLICATIONS

NOTE: Although the proposed statute regarding time limitations for the submission of fee applications has been submitted to Workgroup 3 members for comment, as of this Interim Report it has not been addressed in discussion by the Workgroup. Pending input and discussion at future Workgroup 3 meetings, the draft that appears below is subject to further revisions.

Proposed Statute:

§ 14-XXXX. Time Limit for Billing

- A. Fiduciaries shall submit fee applications at least once a year. All fee requests submitted to the Court more than one year after the services were performed will not be approved, unless ordered by the court or for good cause shown.
- B. Attorneys shall submit their bills at least once a year. All bills submitted to the fiduciary or the court more than one year after the services were performed will not be approved, unless ordered by the court or for good cause shown.
- C. This statute applies only to guardianship and conservatorship cases.

STATUTORY AMENDMENT FOR PROPOSED CASE MANAGEMENT PLAN

Introduction:

Prior to January 1, 2009, Maricopa County Local Rule 5.7(c) required that an estate management plan be filed 90 days after appointment and annually thereafter. This rule was abrogated when the statewide Arizona Rules of Probate Procedure became effective. When it was in effect, Local Rule 5.7(C) required the following information to be provided:

- 1. a summary with original total value of the estate, each year's income and expense total, and current total value of the estate;
- 2. the budget for the year, such as anticipated income and expenses;
- 3. an estimate of the fiduciary fees, if any, anticipated to be incurred during the next accounting period;
- 4. an estimate of the attorney's fees, if any, anticipated to be incurred during the next accounting period; and

5. a summary of the management plan for the next accounting period including any major changes in the management of the estate or placement of the ward expected to occur in the next accounting period.

PROPOSED RULE:

Adopt a comprehensive Case Management Plan that will apprise the Court and the parties regarding the anticipated expenses and needs of the ward or protected person, and the projected administrative costs of the estate, including fiduciary and attorney's fees, for the year ahead. The proposed Case Management Plan would improve understanding and provide transparency in probate matters regarding the costs of administration and the essential activities associated with the management of adult guardianship and conservatorship cases. Title 14 would be amended to require the filing of case management plans as follows:

1. No later than ninety days from the issuance of Letters in an adult guardianship and conservatorship case, which in the case of conservatorship matters, would coincide with the filing of the Inventory and Appraisal pursuant to A.R.S. § 14-5418 and Rule 30(A), Arizona Rules of Probate Procedure.
2. On an annual basis coinciding with the filing of the annual accounting pursuant to A.R.S. § 14-5419 and Rule 30(B), Arizona Rules of Probate Procedure.
3. On an annual basis coinciding with the filing of the annual report of guardian pursuant to A.R.S. § 14-5315 and Rule 30(C), Arizona Rules of Probate Procedure.

PROPOSED FORM OF CASE MANAGEMENT PLAN [See Attachment]