North Dakota Law Review

Volume 23 | Number 3 Article 4

1947

Attorneys Fees

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ATTORNEYS FEES

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A discussion of this subject may cover an exceedingly broad field, and one on which there may be some rather sharp differences of opinion. The writer assumes that when this is considered in the sectional meeting, there may well be amplification of some of the matters hereinafter discussed, and hence will not attempt in this article to get down to fine points on every subject referred to. The various points which will be dealth with in this article will be separately considered.

FEE SCHEDULES

It seems to be the custom and practice in this state to prepare, adopt and submit so-called minimum fee schedules. The prevailing thought seems to be that a fee schedule so adopted is mandatory and binding and should be lived up to by every member of the association. I do not wish to cast any cold water upon the idea of a fee schedule but I do think that a fee schedule should be considered as a guide rather than something that must be followed under all circumstances. I find upon investigation that this subject has twice been considered by the Standing Committee on Professional Ethics and Grievances of the American Bar Association. On May 5, 1930, that committee delivered its opinion, No. 28, which I quote as follows:

"OPINION 28
(May 5, 1930)

"FEES—Should be determined by the circumstances of each case rather than by an obligatory fee schedule.

"A local bar association is considering the adoption of a fee schedule which is intended to be made obligatory upon its members, by provisions that any member failing to conform thereto shall be disciplined by its Grievance Committee. Some of the members of the association, who are also members of this Association, asked the committee to express its opinion as to whether, as a matter of fundamental policy, the adoption of such an obligatory fee schedule by a bar association is desirable. They also asked whether their adherence to such a schedule would not be contrary to Canon 12 of the Canons of Professional Ethics of this Association.

"The Committee's opinion was stated by MR. HOWE, Messrs. Hinkley, Evans, Harris, Pace and Gallert concurring, Mr. Bullitt dissenting.

"A lawyer's adherence to any obligatory fee schedule which is applicable to every case of the same nature, would apparently result in a violation of Canon 12 of the Canons of Professional Ethics of this Association which states the various elements which a lawyer should consider in fixing his fees. The first paragraph of that canon states that the amount of the fee must in each case depend, to at least some extent, on the client's ability to pay, and the canon even goes so far as to say that the client's proverty may require a charge that is actually less than the value of the services rendered, or even none at all. Further than this, the six other guides which the canon provide for determining the proper amount of a fee, make it equally

impossible to fix any standard fee for any given class of cases, as it would be impossible for all cases in any class to fall within the same category insofar as these guides are concerned. The canon plainly indicates that in fixing fees a lawyer should take into consideration all of the circumstances surrounding each individual case. While it states that the customary charges of the Bar for similar services is an element to be taken into consideration, it is only one element and should be considered together with other elements.

"Aside from such bearing as Canon 12 may have on the matter, it is the committee's opinion that any obligatory fee schedule must necessarily conflict with that independence of thought and action which is necessary to professional existance. The usefulness and capacity for service of the members of the profession must vary with their character, learning and experience, and to place the compensation of all of them on a labor union basis, irrespective of their ability or experience, would soon lessen the usefulness of the profession to the public."

On July 23, 1937, the matter was further considered and opinion No. 171 was handed down which I quote as follows:

"OPINION 171

(July 23, 1937.)

"Fees-Obligatory Minimum Fee Schedule-Duty to Adhere Thereto—It Is Improper for a Lawyer, in Fixing His Fees, to Permit Himself to be Controlled by an Obligatory Minimum Fee Schedule.

"Two members of the Association from different localities inquire as to whether it is proper for them to permit themselves to be bound by an obligatory minimum fee schedule adopted by their local bar associations, or whether they may regard such schedule only as a recommendation of appropriate fees to be charged for the services rendered, leaving them free to depart therefrom when they believe conditions warrant.

"Canon 12

"Opinion 28

"The committee's opinion was stated by Mr. McCracken, Messrs. Sutherland, Phillips, Arant, McCoy, Houghton and Bane concurring.

"The answer to this question is suggested by OPINION 28. While much may be said for the desirability of such arrangements, from an economic standpoint, preventing, as they do, the indiscriminate "shopping" by clients in order to obtain legal services at low competitive rates—a practice which frequently bears its own fruits in the character of service obtained—nevertheless, the system is grounded upon a false basis. Legal services are rendered in a relation that is personal and in the highest degree confidential. They should be recompensed on the same basis. If guides for the determination of the amount of the charge be required, they are supplied by Canon 12. The third touchstone therein referred to is "The customary charges of the Bar for similar services.", insofar as a minimum fee schedule reflects this, and only this, it is not to

be condemned. But a binding obligation to adhere, regardless of circumstances, to a rate chart or published tariff of fees for legal services is contrary to the genius of the profession as well as to its best traditions. Hence, no lawyer should permit himself to be controlled by an obligatory minimum fee schedule nor should any bar association undertake to impose such restrictions upon him."

A careful consideration of these opinions show that it is not considered proper for a bar association to attempt to impose upon its membership a mandatory fee schedule. A minimum fee schedule which reflects the customary charges of the Bar for similar services is perfectly proper and is not condemned. But a binding obligation to adhere thereto is deemed contrary to the traditions of the profession.

Value of Legal Services

It will be observed that the value of legal services or the amount which a client should be charged is an exceedingly delicate and touchy subject. The amount of the bill, of course, is one of concern to both the lawyer and the client. Other lawyers, however, have an indirect interest therein. If a lawyer charges too much he may bring the profession into disrepute. If he consistently charges too little, his fellow-lawyers regard him as a competitor who is resorting to price-cutting tactics. There is no yard stick by which the value of the lawyer's services may be mathematically computed. It involves a consideration of the elements which must be taken into consideration and application of the general rules to the facts in the case. This can better be done by older and more experienced lawyers, and every young man finds himself perplexed because he does not know what is right and proper and just to himself as well as his client. Indeed, many of the older lawyers experience some difficulty.

Our Supreme Court has had occasion to lay down the rules, and in the case of *Nelson v. Auch,* 62 N.D. 594, 245 N.W. 819, the Court laid down the principle that professional men in fixing their charges have no right to take into consideration the ability or inability of the client to pay. The Court points out that a lawyer may with propriety reduce his charges or fees in the case of a poor client but this does not give him the right to charge the rich more than his services are worth. The Court further specified the various things which should be taken into consideration in fixing the amount of a fee. I quote from the opinion as follows:

> "The ability or inability of the defendant has nothing to do with the lawyer's right to recover. He is entitled to a judgment for the reasonable value of his services, regardless of the ability or inability of his client to pay and his financial condition cannot be considered in determining such reasonable value.
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> "The circumstances to be considered in determining the compensation to be recovered are the amount and character of the services rendered; the labor, time and trouble involved; the nature and importance of the litigation or business in which the services are rendered; the responsibilty imposed; the amount of money or the value of the property affected by the controversy or involved in the employment; the skill and experience called for in the performance of the services; the professional standing and character of the attorney; and the results secured."

The difficulty, of course, arises in applying these rules to the facts of the case. Many of the elements are intangible. One of the important elements, however, is the amount of time put in on the case. Since the amount of time is an important element, this would suggest the importance of keeping time records on work done for clients. It is humanly impossible for a lawyer to carry in his head the amount of time he puts in on any given case especially if it is in the office over a period of months. There is involved in almost every case a certain amount of consultation, letter-writing, legal research and briefing in addition to the time actually put in in the courts. If a lawyer has and maintains an adquate time record on matters of this kind, the element of time can be kept certain. I do not suggest that time should be the only basis of calculation. But since it is one of the important ones, the least the lawyer can do is to make that element certain. For instance, if in a given piece of work the lawyer conceives his time to be worth $50.00 a day, the time record kept on the case will make the calculation of the fee relative simple. This subject will be further discussed at the sectional meeting.

Relationship Between the Lawyer and His Client on the Subject of Fees.

A difference of opinion between the lawyer and his client on the subject of fees is one that may be extremely embarrassing. The lawyer is selected in the first instance by the client because of the faith in the lawyer's ability, his honesty and integrity. The lawyer and his client work to achieve a result. They are engaged in a joint enterprise to accomplish something that the client desires. Generally speaking this brings the lawyer and his client closer together. When the victory is won, and if a serious disagreement arises as to fees, we find a situation where an otherwise favorable result ends in disagreement, and we might have an otherwise satisfied client leaving in an ugly frame of mind. On the other hand, a lawyer having accomplished a good piece of work may be grieviously disappointed in the attitude taken by his client and his apparent lack of appreciation for his work.

I do not know the right answer to this kind of a situation. Members of the Bar hold different opinions. A few years ago in a series of articles written by Honorable Reginald Heber Smith of the Boston Bar (American Bar Journal, May-August 1940), Mr. Smith said:

> "The rules that the client shall be the final judge helps to meet the most awkward question that lawyers face. A client calls, states his problem, asks the lawyer to take care of him, and then says, 'What will it cost?' Verily, the lawyer cannot tell, but this inability is disquieting to the client. If you ask an architect how much it will cost to build a house, he cannot give even an estimate until he has seen all the specifications. No client can give to the lawyer comparable specifications. For example, neither can they tell how much of a fight the opposing party intends to put up. If you beat him in the trial court and he accepts the verdict, that is one thing, but if he is determined to appeal, that is another. The best answer to the question, 'What will it cost?' is the truthful one, 'I cannot now tell you. I can tell you that we keep careful records; these you can see; we have a cost system; when the work is done we will submit a bill we believe fair. You must feel free to discuss this with us if you want. You are not letting yourself in for an indeterminate liability, because our rule is that you yourself have the

> right to fix the bill.' That rule means exactly what it says. The client can fix his bill. Barring cases of fraud which are covered by the Canons of Ethics, we do accept the client's decision. If we feel he is being unfair, then we respectfully decline to accept further work from him. Most clients are honest, they are prepared to pay for good work, and do pay, but they do not want to get 'stuck'. Candor and openness go a long way with nearly all clients."

It will be noted that in most cases Mr. Smith advocates settlement with a client on terms satisfactory to him at all costs. I realize there may be clients who would, if they could, take advantage of a lawyer and especially a young one. However, it is my belief that these cases are extremely rare. Clients are ordinarily honest and expect to pay well for good work, and ordinarily do pay. It is essential for the welfare of the profession that the general public may feel that they can deal freely, openly and unafraid with lawyers so far as the fee question is concerned. If that feeling can be made known, we will have removed one of the strongest prejudices which exists against the legal profession.

Considering these factors it is my personal view that Mr. Smith comes very close to announcing the correct rule, and that unless a client is guilty of such unreasonableness as to practically amount to an attempt to defraud, the lawyer should not allow a client to leave his office with a bitter feeling because he has had to pay what he considers an unreasonable bill.

I think if the lawyer can ascertain in his own mind as to whether or not the client is actually honest in his conviction as to the amount of the bill, he can readily handle the situation because if a client honestly feels that way about it, and feels honestly that the bill is exorbitant, every consideration and respect should be given to that state of mind, and an amicable adjustment arrived at.

Validity of Contingent Fee Contracts

Generally contingent fee contracts are valid in North Dakota. *Greenleaf vs. R.R. Co.* 30 N.D. 112. However, it must be observed that a contingent fee contract which prohibits the client from entering into or conducting negotiations of settlement or of making any settlement without having first obtained the written consent and approval of the lawyer is against public policy and void. This subject was fully considered by our Supreme Court in Greenleaf vs. R.R. Co. supra, and in *Moran v. Simpson,* 42 N.D. 575, 173 N.W. 769. See also *Simon vs. Railway Co.* 45 N.D. 251, 177 N.W. 107.

STANDARDS FOR TITLE EXAMINATION

By W. F. Burnett

The question of title examination has asumed greatly increased importance within the past few years, so that now the examination of title is a part of practically every real estate transaction. Under modern rules of law when one buys an article of personal property, the seller gives the purchaser perfect title and possession, and usually guarantees the quality of the article and its fitness for the purpose for which it is purchased.

In the purchase of real estate the situation is different. To some extent the old rule of the common law prevails—"let the buyer beware!" In the sale of real estate, the seller generally gives to the purchaser the