

NEW YORK STATE BAR ASSOCIATION  
**Committee on Professional Ethics**

Opinion 689 - 5/12/97 (58-96)

Topic: Accepting Fees from Petitioner for Representation in Guardianship Proceeding in Addition to Court Award.

Digest: Lawyers may accept fees from guardianship petitioner in addition to court award as long as fee is not excessive or contrary to law, court rules, or court order. Lawyers may have to disclose such arrangement to the court.

Code: DR 1-102(A)(4), 1-102(A)(5), 1-102(A)(8), 2-106(A), 2-106(B), 7-102(A)(8).

**QUESTION**

May a lawyer accept fees from a petitioner in a guardianship proceeding in addition to any legal fees awarded by the court under Article 81 of the Mental Hygiene Law?

**OPINION**

Where a person is incompetent, the state's Mental Hygiene Law authorizes a petition to be brought by an interested party for judicial appointment of a legal guardian. The statute authorizes the court to award legal fees to the petitioner's counsel payable from the assets of the incompetent.<sup>1</sup> We are asked to consider whether the Code of Professional Responsibility precludes an attorney who has been retained by a petitioner

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<sup>1</sup> Section 81.16(f) of the Mental Hygiene Law, N.Y. Mental Hyg. Law § 81.16(f) (McKinney 1996) (enacted in 1993 as part of Article 81, which replaced Articles 77 and 78 relating to proceedings for conservatorships and committees) provides that: "When a petition is granted, or where the court otherwise deems it appropriate, the court may award reasonable compensation for the attorney for the petitioner ...."

in a guardianship proceeding from accepting fees from the petitioner in addition to any court award.

Lawyers' fees are always subject to the restriction against "excessive fees" of DR 2-106(A). DR 2-106(B) states that fees are excessive "when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee."

DR 2-106(B) sets forth the following "[f]actors to be considered as guides in determining the reasonableness of a fee": time and labor required, novelty and difficulty of issues, likelihood that acceptance of employment by this client would preclude other employment, the customary, local legal fee for such service, amount involved, results obtained, time limitation, relationship with client, and whether fee is fixed or contingent. These factors have been adopted in New York courts in determining certain fee disputes, *e.g.*, *In re Ralph Lauren Womenswear, Inc.*, No. 95 B 43100, 1997 Bankr. LEXIS 22 (S.D.N.Y. Jan. 9, 1997); *In re Sherbunt*, 134 A.D.2d 723 (3d Dep't 1987).

In making the determination of reasonableness, the attorney should include all compensation for the particular services. If there is a court award and compensation by the petitioner, the total compensation must be weighed against DR 2-106(B)'s factors.

Whether accepting a fee from petitioner in addition to that awarded by the court from the incompetent person's estate constitutes a violation of law, court rules, or a particular court order is beyond the jurisdiction of this Committee. If accepting such a fee is unlawful or violates a court rule or order, it would also be unethical. DR 1-102(A)(5) (prohibition against engaging in conduct prejudicial to the administration of justice); DR 1-102(A)(8) (prohibition against conduct that adversely reflects on lawyer's fitness to practice law); DR 2-106(A) (prohibition against charging an illegal fee); DR 7-102(A)(8) (prohibition against knowingly engaging in illegal conduct in the representation of a client). If acceptance of a separate fee from the petitioner is lawful, we see no ethical bar to accepting both the court-awarded fee and a supplement from the petitioner provided the total fee received is not excessive, as discussed above.

Additionally, a lawyer must consider disclosing such a fee arrangement to the court presiding over the guardianship proceeding before the court fixes its award. The lawyer must decide if under the particular facts and circumstances of the case a failure to disclose the fee arrangement with petitioner would constitute deceitful or misleading conduct in violation of DR 1-102(A)(4).

## **CONCLUSION**

A lawyer may accept fees from a petitioner in a guardianship proceeding in addition to a court award as long as the total fee is not excessive, and acceptance of such fee is not in violation of any law, court rule, or court order.

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