REASONABLE ATTORNEYS' FEES*

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SUBJECT TO COURT SUPERVISION:

"An attorney's billing for legal services cannot be separated from the attorney client relationship. Because of their fiduciary relationship, the attorney's fees are subject to scrutiny and regulation not applicable to fees for most commercial services." *Cripe v. Leiter,* 184 Ill.2d 185, 199, 703 N.E.2d 100 (1998).

RIGHT TO SEEK FEES FROM CLIENT

Under old Illinois law, an attorney could not seek fees from his or her own client for services rendered within the marital proceeding. Instead, the lawyer was required to institute a separate and independent proceeding to pursue fees from his or her respective client. But the law related to seeking fees against one's own client changed in 1977. See *Myers v. Brantley*, 204 Ill.App.3d 832, 149 Ill.Dec. 891 (4th Dist. 1990), *Seniuta v. Seniuta* (1977), 49 Ill.App.3d 329, 7 Ill.Dec. 166, 364 N.E.2d 327, and Section 508(a) of the Illinois Marriage and Dissolution of Marriage Act.

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THE IMPORTANCE OF AN EXPRESS CONTRACT FOR SERVICES

Section 508(a) of the IMDMA points out, "fees and costs may be awarded to counsel from a former client in accordance with subsection (c) of this section." 750 ILCS 5/508(a). Thus, in order to pursue a client for fees within the divorce proceeding under Illinois law, an attorney must have a signed engagement agreement (Section 508(c). The benefits of a signed engagement agreement go far beyond the terms expressed in the Act. That is because "where a client and his attorney have an express contract for compensation, that contract will control the amount of compensation due the attorney from the client. And *quantum meruit* principles are not involved." *People v. Kinion* 97 Ill.2d 322, 332, 454 N.E.2d 625 (1983).

"Unlike fee petitions and claims for *quantum meruit* fees, in which the trial court makes an independent valuation of reasonable attorney fees, where an express contract governs the compensation due an attorney, the hourly rate agreed to by the parties is the starting point of the court's analysis." *Wildman, Harold, Allen and Dixon v. Gaylord,* 317 Ill.App.3d 590, 601, 740 N.E.2d 501 (1st Dist. 2000). *In re the Marriage of Angiuli*, 134 Ill.App.3d 417, 424, 480 N.E.2d 513 (2nd Dist. 1985) held: "where an attorney and client have an express contract for compensation it will control the issue in absence of unconscionability or other contractual impropriety."

ETHICAL CONSIDERATIONS AND RULE 1.5

The answer to resolving all fee disputes, is not as easily resolved as entering into an express written contract. *Cripe* stated "unlike ordinary merchant-consumer relationships, the relationship between attorney and client is fiduciary in nature. . . . Because of that fiduciary relationship, the attorney's fees are subject to scrutiny and regulation not applicable to fees for most commercial services." 184 Ill.2d at 198-199.

"Historically, the regulation of attorney conduct in this state has been the prerogative of this court. In the exercise of this power, this court administers a comprehensive regulatory scheme governing attorney conduct. The Illinois Rules of Professional Conduct adopted by this court set forth numerous requirements to which attorneys in this state must adhere. 134 Ill.2d Rs. 1.1 through 8.5. Violation of these rules is grounds for discipline. This court has appointed an Attorney Registration and Disciplinary Commission (ARDC) to supervise the 'registration of, and disciplinary proceedings affecting, members of the Illinois bar.' 134 Ill.2d R. 751. This court has also created a procedural scheme under which the ARDC operates, providing detailed regulations involving inquiry, hearing and review boards. 166 Ill.2d R. 753. The purpose of this regulatory scheme is to protect the public and maintain the integrity of the legal profession." *Cripe*, 184 Ill.2d at 195-196. The Supreme Court's regulatory scheme extends to the area of attorney's fees. Rule 1.5 of the Rules of Professional conduct specifically addresses the subject. The first sentence of Rule 1.5 explicitly states that "A lawyer's fee shall be reasonable." 134 Ill.2d R. 1.5.

In order to determine what is reasonable, Rule 1.5 outlines numerous factors to be considered. In pertinent part, Rule 1.5 states:

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

134 Ill.2d R. 1.5(a).

PRACTICAL CONSIDERATION #1

The reasonableness requirement is intended to protect the public from unscrupulous lawyers who would engage in conduct involving fraud, dishonesty, deceit or misrepresentation. The reasonableness requirement is not created to relieve clients from their contractual obligations to pay for the professional services that an attorney renders on behalf of that client. Furthermore, the rule is not meant to hinder the rights of attorneys and clients to engage in a contract which outlines the agreed upon value of the services to be rendered.

RULE 1.5 AND THE ILLINOIS MARRIAGE AND DISSOLUTION OF MARRIAGE ACT

As the Supreme Court in *Nottage v. Jeka*, 172 Ill.2d 386, 397, 667 N.E.2d 91, (1996), pointed out, "a claim for fees, whether made under section 508 or in a separate common law action, as here, must satisfy certain professional standards. Rule 1.5 of the Illinois Rules of Professional Conduct requires that a fee for legal services be reasonable, and the rule specifies standards relevant to that determination. 134 Ill.2d R. 1.5."

The overwhelming majority of courts that have considered fee petitions by attorneys against their own clients, as well as the opposing party, set forth standards consistent with Rule 1.5 in the determination of whether or not the fee was reasonable. See: *In re the Marriage of Angiuli*, 134 Ill.App.3d 417, 480 N.E.2d 513 (2nd Dist. 1985); *In re the Marriage of Ransom*, 102 Ill.App.3d 38, 429 N.E.2d 594, (2nd Dist. 1981); *Donnelley v. Donnelley*, 80 Ill.App.3d 597, 400 N.E.2d 56, (1st Dist. 1980); *Gasperini v. Gasperini*, (1978), 57 Ill.App.3d 578, 15 Ill.Dec. 230, 373 N.E.2d 576, (1st Dist. 1978); *In re the Marriage of Janetzke,* 97 Ill.App.3d 418, 422 N.E.2d 914, (1st Dist. 1981).

PRACTICAL CONSIDERATION #2

It is wise to outline the factors considered in Rule 1.5 in the engagement agreement itself. By explaining to a client what considerations are undertaken in the determination of a reasonable fee, the client will have a better understanding of the true value of the services they are receiving.

ABILITY TO PAY IS NOT APPROPRIATE CONSIDERATION WHEN SEEKING FEES AGAINST ONE'S OWN CLIENT

Under the Illinois Marriage and Dissolution of Marriage Act, a court, after considering the financial resources of both parties, may order one party to pay for the attorney fees for another party. See 750 ILCS 5/508. An important consideration, when ordering one spouse to pay the other spouse's fees, is each spouse's ability to pay. However, when the court is considering awarding fees to an attorney from his own client, such a consideration is inappropriate. In *Nottage v. Jeka* the Supreme Court held, "we question the relevance of that consideration, (financial resources of the party), however, when the fee is being sought from the attorney's own client. As the appellate court noted in *In re Marriage of Ransom,* 102 Ill.App.3d 38, 41, 57 Ill.Dec. 696, 429 N.E.2d 594 (1981), in rejecting the contention of a client that the court in a proceeding under section 508(a) erroneously failed to consider her resources in determining the fee she owed her attorney, 'Regardless of the respective financial circumstances of the spouses, an attorney is still entitled to seek payment for his services from his own client, and the legislature in providing this procedure did not intend that it be conditioned upon the financial abilities of the parties.' We believe that a consideration of financial resources is peculiarly suited to cases in which one party seeks contribution for attorney fees from the opposing party, rather than when the fee is imposed against the attorney's own client." 172 Ill.2d at 397.

FACTORS TO CONSIDER:

TIME - THE MOST PREDOMINANT, BUT FAR FROM THE ONLY, FACTOR

The court in *Donnelley* pointed out, when considering the various factors to be considered in determining whether a fee was reasonable, "of these, the time factor is probably given the same weight or greater weight than any other factor." 80 Ill.App.3d at 602.

"In addition, it has been held that the time charged must have been necessary for the proper handling of the matters involved. (*Gasperini v. Gasperini; Moreau v. Moreau* (1973), 9 Ill.App.3d 1008, 293 N.E.2d 680); that the fees must be fair and just to all parties involved (*Canham v. Saisi*; *Green v. Green*); that the time expended and the work done must be itemized (see *In re Marriage of Raidbard* (1980), 87 Ill.App.3d 158, 42 Ill.Dec. 312, 408 N.E.2d 1021; *In re Sharp* (1978), 65 Ill.App.3d 945, 22 Ill.Dec. 581, 382 N.E.2d 1279); and as stated in *In re Marriage of Jacobson* (1980), 89 Ill.App.3d 273, 277, 44 Ill.Dec. 581, 584, 411 N.E.2d 947, 950: '(I)t is not sufficient to merely multiply the number of hours expended by counsel, even as shown by detailed records, by whatever hourly rate is determined to be reasonable without consideration of the other factors.' . . ." *Janetzke*, 97 Ill.App.3d at 424

SKILL AND EXPERTISE OF ATTORNEY

The skill and expertise of a lawyer is often a factor lawyers take into consideration when setting their own fees. In addition, a review of the case law shows that a court rarely

finds that a particular lawyer's skills or expertise is lacking or insufficient. As will be discussed later, because of various economic factors, rates charged for highly skilled attorneys in Illinois, as well as across America, have substantially increased over the last decade.

PRACTICAL CONSIDERATION #3

When filing a petition for fees and costs, an attorney should include, for all lawyers working on the matter, a brief summary describing the respective lawyer's skills, expertise, experience in family law, and the hourly rates usually paid for his or her services.

NOVELTY OR DIFFICULTY OF THE QUESTIONS RAISED

For counsel to come up with a novel argument is not, in and of itself, enough to justify extra consideration in a fee award. Simply putting a new spin on an issue typically encountered by divorce practitioners will not justify a fee charged. See: *In re the Marriage of McFarlane*, 160 Ill.App.3d 721, 729-730, 513 N.E.2d 1146, (2nd Dist. 1987). However, when the argument is novel and the questions raised are difficult or complex, under Rule 1.5, there is added justification for a fee award.

PRACTICAL CONSIDERATION #4

In the fee petition, an attorney should specifically set forth any novel issues and complexities encountered. The consideration is enhanced by showing some type of positive result, which was a result of the time spent on difficult or complex issues. See *In re the Marriage of Hirsch,* 135 Ill.App.3d 945, 482 N.E.2d 625 (1st Dist. 1985).

USUAL AND CUSTOMARY CHARGES IN THE COMMUNITY

As the court in *Sullivan v. Fawver,* 58 Ill.App.2d 37, 43, 206 N.E.2d 492, (2nd Dist. 1965), stated "in determining what the reasonable value of an attorney's services are, in the absence of an express contract, it is proper for the judge or jury to consider the usual and customary fees for similar services in the same community."

Although this may seem like a relatively easy factor to take into consideration, defining "community" can prove to be somewhat difficult. The appellate court in the 1991 case of *In re the Marriage of Girrulat*, 219 Ill.App.3d 164, 171-172, 578 N.E.2d 1380, (5th Dist. 1991), citing the 1986 case of *In re the Marriage of Morse*, 143 Ill.App.3d 849, 493 N.E.2d 1088, (5th Dist. 1986), when considering the value of the attorney's services rendered to the wife, and the fee award which the husband was required to pay, limited the term "community" to the county where the case was heard (Christian County, Illinois). The court did not accept a definition of community to be made up of a number of the surrounding counties.

In today's society the world is shrinking, and the lines that once separated one "community" from another are blurring. Our society has become a mobile one. This mobility is a result of technological advancements, which provide for instantaneous communications through cell phones and Blackberries, as well as the ability to access information from virtually anywhere. Even the traditional notions of an "office" are changing. This is the reality that today's lawyers face. To limit the definition of "community" to a single county where the case was heard, simply does not keep up with today's rapidly evolving definition of community. People do not limit their commercial transactions and lives to a single county. It is now common for an attorney who largely practices in Cook County, to regularly travel to DuPage or Lake County to render services to a client, or for the Lake and DuPage County attorneys to travel to one of the other three. Attorneys may even belong to several of the different counties' local bar associations – something unheard of twenty years ago.

In light of an attorney's skill and reputation, the attorney's hourly rate has been established by the forces of supply and demand. His or her principal office may be in a different county and may vary from the rates charged by attorneys primarily officed in the county where the case is pending. There is no reason to force the attorney to offer a different rate to a client, simply because that client's case will be heard in a particular county. Crossing a county line neither diminishes nor increases the value of an attorney's time.

Courts must recognize that "community" is now beyond county limits and keep an open mind to expanding the traditional definition of "community".

The court in the 1985 case of *In re the Marriage of Angiuli*, relying on the 1910 case of *Crane v. Roselle*, 157 Ill.App. 595, 1910 WL 2296 (2nd Dist. 1910), followed the parochial view of the past. The court disagreed with the attorney's argument that "Chicago attorneys who are engaged in Chicago to perform services in other counties or states are entitled to recover fees in accordance with the usual, customary and established fees of Chicago lawyers." 134 Ill.App.3d at 424. However, it should be noted in this case the parties failed to reduce their fee agreement to writing. Once again, attorneys are reminded of the importance of the express written agreement for services.

Courts must respect individuals' right to contract. The court in *Alexander v. Stern*, 252 Ill.App. 286, 287, 1929 WL 3193, (1st Dist. 1929), recognized this right. In that case, a Chicago couple contracted for the services of a Chicago attorney, in his Chicago office, for services to be rendered in Michigan. When the issue of attorneys' fees was brought before the court, the court determined that, in light of these facts "we must therefore assume that the parties contemplated that the rate of compensation would be the usual rate paid for such services in Chicago."

Only in the absence of a written agreement or when a fee is shockingly high need a court resort to looking at the usual and customary fees in the community. A problem expressed by the *Angiuli* Court was that the attorney "does not suggest what the standard should be to determine fees of down-state attorneys for work they may do in a Chicago court." 134 Ill.App.3d at 424. The standard should be the same – what the lawyer is charging and typically being paid for his/her work.. A signed contract controls the agreement. If there

is no written contract or fees are sought from the other party, then the usual and customary charges of the community should be considered, but "community" needs to reflect the true metropolitan landscape of the area.

BENEFIT TO THE CLIENT

"As we have stated, the results obtained in a case, along with the various other factors, is a circumstance to be considered as a guide in determining the reasonableness of attorney fees. In order to avoid an irrational fee there must be a correlation between the services performed and the applicable factors. Based on the weight or value assigned to each of the relevant factors, the fee may be adjusted upward or downward. To that extent, the fee may be 'enhanced' or decreased." *In re Marriage of Malec*, 205 Ill.App.3d 273, 287, 562 N.E.2d 1010, (1st Dist. 1990).

Contingent fees are not allowed in domestic relations proceedings pursuant to Rule 1.5, with a limited exception. However, the fact that a court will look at the benefit to the client, will not make the fee contingent. "In [the Maryland appellate case of *Head v.] Head,* the court stated that because the results obtained is one of the factors considered in determining the fee, it does not render the fee contingent. (66 Md.App. at 668, 505 A.2d 868.) In Illinois, the results obtained is also a factor to be considered as a guide in determining the reasonableness of a fee. (107 Ill.2d R. 2-106(b)(4).) Thus, to the extent that *Head* stands for the proposition that consideration of that factor does not convert the fee into a contingency fee, we agree." *Malec*, 205 Ill.App.3d at 288. (The court found where petitioner agreed to pay his attorney $1 million if certain, particularized results were obtained it was a contingency fee).

PRACTICAL CONSIDERATION #5

In a Fee Petition, an attorney should outline the positive benefits that were a result of the attorney's representation of the client. This will help to justify to the court the contention that the fees charged are reasonable.

COURT'S RELIANCE ON THEIR OWN KNOWLEDGE

The courts are responsible to litigants for the use of their own knowledge of the value of services rendered, and should and will take into consideration such knowledge." *Golstein v. Handley*, 390 Ill. 118, 125, 60 N.E.2d 851, (1945). Or, as the court in *In re the Marriage of Powers*, 252 Ill.App.3d 506, 508, 624 N.E.2d 390, (2nd Dist. 1993), citing *In re Marriage of Walters*, 238 Ill.App.3d 1086, 604 N.E.2d 432, (2nd Dist. 1992), put it, "the trial judge may rely on his or her own knowledge and experience when deciding the value of the services provided."

Once again, it is important to remember that the courts responsibility to the litigant is to prevent unethical attorneys from taking advantage of individuals, and it is not the court's responsibility to interfere with the litigant's basic ability to contract for services. A court may inquire into that "reasonableness," with Supreme Court Rule 1.5 as its guide. As stated in *Uphoff v. Uphoff,* 80 Ill.App.3d 145, 148, 398 N.E.2d 1243, (3rd Dist. 1980), citing, *Moses v. Moses*, 132 Ill.App.2d 443, 270 N.E.2d 513, (1st Dist. 1971), "although [attorney's fees] is an area where the trial court is permitted wide discretion, that discretion is not unbounded."

FEE AWARDS SHOULD BE FAIR TO BOTH ATTORNEY AND CLIENT

As numerous courts have stated, including the court in *Donnelley*, "the award of fees should provide fairness to all concerned, the attorney; the client; and the person who will make the payment." 80 Ill.App.3d at 602. This means that courts not only have a responsibility to the litigants to protect them from unscrupulous attorneys, but courts also have a responsibility to attorneys, to make sure that they are adequately compensated for their services.

LAW FIRM ECONOMICS

Just as courts realize that the determination of a reasonable fee is more than a simple equation where one multiplies the hourly rate by the hours worked, courts must also understand that the amount of a gross fee award is not equivalent to spendable income to the lawyer or firm. In what is loosely termed "overhead," lawyers have large expenses in the form of occupancy costs, administrative staff, technology, office equipment, insurance, and professional fees, just to name a few.

According to the American Express Tax and Business Services, Inc. in the *Chicago Edition* of their "2005 Law Firm Financial Benchmarking Survey." only 37.6% of all attorney fees *collected* translates into net income for the smaller law firm. The survey was compiled from information submitted from 69 different Chicago law firms, the majority of which were smaller firms, defined as under 50 attorneys. Given these statistics, let's consider what a large fee award like $250,000 means to the attorney. In

reality, such an award translates to $94,000, assuming it is fully collected. Although a substantial sum, it really is not considering all of the hard work, pressure, time and effort placed into earning that fee.

And what of those fees and fee awards not fully collected? It is universally accepted that the collection rate, also known as realization rate, in family law matters is below most other law practice areas. Assuming an overall collection rate of 85%, (most family law attorneys would think that excellent), the $250,000 award nets out to only $79,900 of income to the lawyer or firm. The 37.6% net income from gross fees charged and awarded shrinks to 32%. And then there are income taxes.

It is the attorney's responsibility to help keep the members of the bench informed as to the economics of running a law practice. In addition, the bench, as part of its responsibility to insuring that a fee award is fair to "all parties involved" (See *Janetzke*, 97 Ill.App.3d 424), which included the lawyers, must become aware, and not ignore the economics when determining a reasonable fee.

INDIVIDUAL ATTORNEY RATES

The cost of running a law office, predictably, has also caused attorney fees to go up nationwide. A 2005 survey by *The National Law Journal* indicates that most firms raised their rates for both partners and associates. The survey also included a submission of a four figure hourly rate, a first for *The National Law Journal.* Benjamin Civiletti of the Washington D.C. based law firm Venable, LLP, reported to *The National Law Journal*

that he bills clients at the rate of $1,000 per hour for his services. It is unlikely that he is alone in this category. The Minneapolis based law firm of Dorsey & Whitney reported an attorney that charges an hourly rate of $835 per hour.

High rates for attorneys are not just isolated cases in select cities. Here in Chicago, attorneys are charging $700 and up per hour of time. Media reports cite Dan Webb of Chicago-based Winston & Strawn, who represented former General Electric Chairman Jack Welch in his high profile divorce proceeding, charges $700 per hour. The lead attorney representing United Airlines parent company in its bankruptcy proceeding, James H.M. Sprayregen of Kirkland & Ellis, was billing at the average rate of $730 per hour back in January of 2004. Several Chicago area matrimonial lawyers known to be charging between $500 and $600 per hour include Muller Davis, James Feldman, Bernard Rinella, and your author, as well as others. An attorney's billing rate is determined by the economic forces of supply and demand. The rates listed above are a reflection of the high-end of the rates that are customary in the metropolitan Chicago community for matrimonial actions.

AVERAGE OR BLENDED HOURLY RATES

In addition to courts not focusing only on the gross amount of the fee award, when considering the value of the attorney's fees for a client, the courts should not just look at the billing rate of the attorney with the highest billing rate working for that client. Instead, courts should look at what is referred to as the "blended rate" or the "average hourly rate." for the services rendered to the client. This rate is the result of the total

amount charged, divided by the total amount of hours billed by all professionals working on the case. The result is a much more accurate picture of the actual hourly rate that is charged to the client. The client benefits when work is delegated to more junior attorneys or other support staff, such as paralegals, who are as capable of performing that work as the primary billing attorney, but at a lower rate.

Although this model of practice is not available to pure solo practitioners, that does not mean that the courts should not consider the average blended hourly rate billed to the client when determining whether a fee is reasonable when the model is used.

The First District Appellate Court in *In re the Marriage of Thornton*, 89 Ill.App.3d 1078, 1094-1095, 412 N.E.2d 1336, (1st Dist. 1980), looked at the "average hourly rate" charged by the petitioning law firm, which consisted of work performed by a senior partner, a junior partner, three associates, and a paralegal, all at varying rates, and specifically noted that the research tasks involved in the case were assigned to young associates with relatively low billing rates. Based on the review of work done at varying rates, the appellate court reversed the trial courts reduction of the fee awarded. Similarly, the Second District in *In re the Marriage of Scott*, 85 Ill.App.3d 773, 782, 407 N.E.2d 1045 (2nd Dist. 1980), affirmed an award of attorney fees after considering "the varying qualifications and responsibilities of each of the attorneys involved, and the high quality and comprehensive nature of the work done in this case."

PRACTICAL CONSIDERATION #6

When explaining the hourly rate to be charged to a prospective client, and also listed in the retainer agreement, there should be a disclosure in the written agreement, which explains that work may be delegated to other professionals in the firm, in order to save the client money; or in the case of the solo practitioner, that since all work will be done by him/her, including work that may not require their level of expertise, the billing rate has already taken this factor into account. By including an explanation of how the fee is arrived at, or how it is actually a composite of a variety of rates, utilized to maximize the benefit to the client, this will help to show the court that both parties made informed decisions as to the fee agreement.