1972

Minimum Fee Schedules: Guides or Strait Jackets

Robert L. Simmons

Gary N. Holthus

Minimum Fee Schedules: Guides or Strait Jackets?

Robert L. Simmons and Gary N. Holthus***

Minimum fee schedules do not take into account a sufficient number of the variables to justify their absolute application. However, that is not to say that they are not valuable as guides.[1]

SEVERAL STATES HAVE MINIMUM FEE SCHEDULES that set the least amount of compensation a lawyer should charge for a specific legal service.[2] There has been much confusion in bar associations across the country as to the application of minimum fee schedules and the consequences of non-compliance. The American Bar Association has published both formal and informal opinions in an attempt to clearly define the functions of the schedules. In view of the opinions, interviews and statistical studies on the subject of minimum fee schedules,[3] it is apparent that they are too rigid to cope with the practical needs of the profession but are valuable resources where their function is viewed as a guide. Under the Kansas Relative Value System the lawyer is given a more flexible system that allows him to take into consideration all the necessary factors in arriving at a fair and just fee.

Minimum Fee Schedules Today

The promulgation of and adherence to minimum fee schedules throughout the U.S. has easily kept pace with nuclear research and inflation. Local Bar schedules on file with the American Bar Association have grown from only a few in the early 1950's to more than 700 in 1970.[4] Throughout these 700 local and state Bar Associations there is a wide disparity in minimum rates.[5] This fact leaves much

---

*Assoc. Prof. of Law, Cleveland State University College of Law.

**B.S., Kent State University; Third-year student, Cleveland State University College of Law.

[1] Interview with Philip H. Lewis, President Kansas State Bar Association, February 4, 1972.

[2] Weil, *Economic Facts for Lawyers-Status of the State Wide Fee Schedules*, 4 LAW OFF. ECON. 339 (1963).

[3] The Minimum Fee Schedule and the Constitution of the Cuyahoga County Bar Association, (1970); Manual on Fees and Charges Including Suggested Minimum Fee Schedule of The Illinois State Bar Association (1962).

[4] The Minimum Fee Schedule and the Constitution of the Cuyahoga County Bar Association 1 (1970).

[5] Following are the minimum fee schedules for the various states. The figure immediately after the state represents the high minimum fee in that state for the service under consideration i.e. uncontested divorce or trial per diem, while the second figure represents the low minimum fee for that state. The following figures are regarding uncontested divorce: Alabama, $200-125; California, $1,000-200; Colorado, $250-200; Connecticut, $600-400; Florida, $400-100; Illinois, $300-150; Indiana, $375-100; Iowa, $250-100; Kansas, $300-150; Louisiana, $250-150; Maine, $200-150; Michigan, $400-250; Minnesota, $275-200; Mississippi, $200-150; Missouri, $250-150;

(Continued on next page)

doubt as to whether the minimum fee, which is supposed to give the public a reasonable idea of what a specific legal service costs, is justified by the difference in economic conditions. A recent study indicates that the economic differences are not a valid justification:

> The fees for specific services such as divorce, corporation formation, and bankruptcy, were more positively correlated to state per capita income than hourly rate . . . ; the fees for these specific items were not significantly correlated with the level of the hourly rate, the apparent foundation of the fee schedules. This buttresses the conclusion that some, if not many, of the fees are unreasonable.[6]

For purposes of illustration let us compare the high minimum fee schedule and low minimum fee schedule in California, New York, and West Virginia for an uncontested divorce. The high minimum fee in California is one thousand dollars ($1,000.00) with the low minimum fee within that state set at two hundred dollars ($200.00). West Virginia has a high of two hundred and fifty dollars ($250.00) and a low of seventy-five ($75.00). New York finds itself somewhere in the middle with a high minimum fee of five hundred ($500.00) and a low of two hundred and fifty ($250.00). In viewing the present state of the economy, the difference in the economic standards of these geographic areas in relation to the tremendous disparity in minimum fee schedules, throughout the country, one can only conclude that the vast majority of these schedules are unreasonable, overly restrictive and arbitrary.

Perhaps the most unreasonable feature of the minimum fee schedule is that it constructively discriminates against the lower middle class "Joe", who works from 8:00 a.m. to 5:00 p.m. five days a week, makes enough that legal aid turns him down but does not have the dollars to hire a lawyer. One such frustrated American put his situation this way:

> . . . I got a bum deal from a used car salesman in 1970. I went to four different lawyers. They all said I had a good case but they wouldn't guarantee me anything and they were going to charge $35 an hour win or lose. Next I went to Legal Aid, but I didn't qualify cause I had a regular job. So I took

---

(Continued from preceding page)

Nebraska, $300-200; New Jersey, $600-400; New Mexico, $200-150; New York, $500-250; North Carolina, $150-100; Ohio, $450-150; Oklahoma, $250-150; Pennsylvania, $350-200; Tennessee, $250-150; Texas, $300-150; Virginia, $250-150; Washington, $300-250; West Virginia, $250-75. The following figures are regarding trial per dieum: Alabama, $150-120; Arizona, $250-200; California, $500-150; Colorado, $225-175; Connecticut, $250-100; Florida, $250-150; Illinois, $300-200; Indiana, $200-25; Iowa, $200-100; Kansas, $250-50; Maine, $100-75; Maryland, $200-150; Michigan, $300-200; Minnesota, $200-75; Mississippi, $250-100; Missouri, $200-150; Nebraska, $200-75; New Hampshire, $200-150; New Jersey, $225-150; New York, $250-100; North Carolina, $200-35; Ohio, $250-125; Oklahoma, $250-100; Pennsylvania, $350-200; Tennessee, $250-100; Texas, $300-150; Virginia, $250-150; Washington, $300-$250; West Virginia, $250-75; Wisconsin, $300-30.

[6] Arnould & Corley, *Fee Schedules Should be Abolished* 57 A.B.A.J. 655, 659 (1971).

> my lumps. I tell you, the law is for country clubbers and reliefers . . . nobody in between.[7]

The complexity of the law today makes it necessary often times to have the boundaries in certain areas firmly established. However, there are many situations where the setting of exact standards, rules, schedules etc., become inflexible so as to work unjust results. The minimum fee schedule definitely falls into this latter category in that it sets the lawyers' base figure and for those who cannot ante up the doors of justice are closed.

> I told him I couldn't afford a divorce if it was going to cost $400, even though Bill wasn't going to contest it. He said he couldn't help it. He couldn't charge less than his bar association rate.[8]

Many courts have recognized the need for a flexible standard to properly determine what a particular client should be charged for his case. The Supreme Court of Illinois expressed their position as follows:

> The value of legal services will often times depend upon a variety of considerations, such as the skill and standing of the person employed, the nature of the controversy, the character of the questions at issue, the amount or importance of the subject matter of the suit, the degree of responsibility involved in the management of the course, the time and labor bestowed. For such services there can be no established market places . . .[9]

In reflecting back on the lady who wanted an uncontested divorce but could not raise the four hundred dollars ($400.00) it is submitted that "the benefits sought for the client"[10] were slight if not non-existent. Minimum fee schedules for the most part are too rigid and don't take into consideration all the necessary variables. They can serve as a valuable guide but their function must not extend beyond that point.

Effect of the Schedules: Local

As previously mentioned there are hundreds of local bar associations across the country that have minimum fee schedules.[11] The effect on the local practicum has been one of fear, confusion and misapplication. For example the Lake County Bar Association of Ohio has printed on the front page of its 1970 minimum fees schedule[12] this statement:

> Your president respectfully calls your attention to Formal Opinion 302 of the Committee on Professional Ethics of the

---

[7] Interview with client who preferred to remain anonymous.

[8] *Id.*

[9] Louisville N.A.&C. Ry. Co. v. Wallace, 136 Ill. 87, 93, 26 N.E. 493, 495 (1891); Hofing v. Willis 83, Ill. App.2d 384, 227 N.E.2d 797 (1967).

[10] *Supra* note 6, at 658.

[11] *Supra* note 5.

[12] Lake County Bar Association, Recommended Minimum Fees (Oct. 20, 1970).

American Bar Association, which opinion provides in part as follows:

> The habitual charging of fees less than those established by a minimum fee schedule, or the charging of such fees without proper justification may be evidence of unethical conduct.[13]

Also consider the effect of the Committee's Informal Opinion 585:

> Where disciplinary action is necessary against an individual lawyer, this is normally initiated by his local Bar Association and effectuated through an appropriate proceeding in the courts. It seems inescapable to the Committee that in an appropriate case evidence that a lawyer whose conduct is under scrutiny had habitually charged fees less than those suggested or recommended by a minimum fee schedule adopted by his local Bar Association under circumstances and upon the basis set forth above, or that he had charged such fees without justification, would be admissible as being material and relevant.[14]

The "chilling effect" of such language on fee charging practices of lawyers, inexperienced as well as experienced, impoverished as well as affluent can hardly be overstated. Since most lawyers graduate law school somewhat impoverished, it is not unreasonable for a young lawyer to take a case below the minimum fee. However, if the young lawyer takes less than the minimum in an attempt to be reasonable and work justice, he would be the center of local "jawboning" by members of the local bar. Not only would his much needed rapport with local attorneys be endangered, but he may be subject to possible disciplinary action by the grievance committee. One young attorney explained his paradoxical situation this way:

> Soon after I passed the Bar and opened my office I started handling small collections on a one third fee. Hell, I was starving. I would have taken them for ten per cent. Well, it wasn't long before I got the word that the minimum fee was fifty per cent and I better start charging that or I'd be in trouble with the grievance committee.[15]

In addition to the fear and confusion that has been created in members of local bar associations as a result of the A.B.A. opinions on the consequences of "undercharging", there has been extensive misapplication of the minimum fee schedules. The schedules circulated throughout the Bar Associations, for the most part, fail to explain what is expected of an attorney for the minimum fee listed. For example, in the handling of a probate matter some lawyers would charge what the fee schedule called for, which would be a court set fee in this instance for filling out the forms required, but then anything extra would be charged accordingly. On the other

---

[13] ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 302 (1967).

[14] *Id.* No. 585.

[15] *Supra* note 7.

hand, some lawyers do those extra things as a matter of course without any extra charge.[16] The fact that lawyers do not interpret the numerical minimum fee schedule in the same light strongly indicates the effect of the schedule should be that of a *guide* rather than a fixed minimum amount. Mr. Peter Roper, Executive Secretary of the Cleveland Bar Association stated:

> My own feeling is that any valid fee guide should not only help you to determine how much you should charge but it should tell you what you ought to do for your money, as ours now does.[17]

The A.B.A. Position Today on Enforcing Minimum Fee Schedules

Prior to the adoption of the Code of Professional Responsibility[18] the A.B.A. strongly indicated in Formal Opinion 302 and Informal Opinion 585 that consistent "undercharging" by lawyers could result in disciplinary action. This position has been abandoned by the A.B.A. as being *clearly wrong.* The strongest evidence of this 180 degree swing in position is as follows:

> The determination of the reasonableness of a fee requires consideration of all relevant circumstances, including those stated in the Disciplinary Rules. The fees of a lawyer will vary according to many factors, including the time required, his *experience, ability* and *reputation,* the nature of his employment, the responsibility involved and the results obtained. Suggested fee schedules and economic reports of state and local bar associations provide some guidance on the subject of reasonable fees.[19] [Emphasis added]

The Committee seems to have recognized the menace created by minimum fee schedules and aimed its new rules and considerations toward being more flexible. This is very clear in Disciplinary Rule 2-106[20] of the Code, paragraph B, which presents eight factors[21] to be used as guides in determining a reasonable fee. Perhaps the most important parts of Rule 2-106 is the giving of reasonable consideration to a lawyers experience, reputation and ability to perform the services[22] along with the fee to be that which is customarily charged in

---

[16] Interview with Mr. Peter P. Roper, Executive Secretary of the Cleveland Bar Association on February 11, 1972 by Peter P. Zawaly.

[17] *Id.*

[18] ABA CODE OF PROFESSIONAL RESPONSIBILITY AND CANNONS OF JUDICIAL ETHICS (1970).

[19] *Id.* EC 2-18, at 6.

[20] *Id.* DR 2-106 at 9.

[21] *Id.* The following are the factors that the ABA states should be considered in determining the reasonableness of a fee: (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) The liklihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) The fee customarily charged in the locality for similar legal services; (4) The amount involved and the results obtained; (5) The time limitations imposed by the client or by the circumstances; (6) The nature and length of the professional relationship with the client; (7) The experience, reputation, and ability of the lawyer or lawyers performing the services; (8) Whether the fee is fixed or contingent.

[22] *Id.* No. 7.

the locality for similar legal services.[23] Prior to this the Committee's Opinions gave little if any weight to these factors.

Although the language of the A.B.A. in its Code[24] is clear, the Committee was not satisfied. They felt an attempt should be made to repair the unfortunate consequences of their prior opinions and convert errant local bar groups who, like Lake County Bar Association were misled by them. This end was sought through the wide circulation of Formal Opinion 323:

> Considerable confusion still appears to exist in the minds of many members of the Bar in regard to the effect to be given minimum fee schedules. This Committee has heretofore attempted to clarify this situation in its Formal Opinion 302 and Informal Opinion 585; but these opinions continue to be misinterpreted and even misquoted, with results which tend to negate the actual holdings of the opinions.[25]

In addition to the A.B.A.'s taking great pains to remove much of the confusion about minimum fee schedules they have apparently abandoned some of the old rationale that stood beyond the formal and informal opinions on the matter. One such theory was that if lawyers did not at least charge the minimum fee, discredit would be brought to the local Bar and the profession as a whole. The adoption of Rule 2-106 (B) of the Code, which includes various factors[26] to be used as a *guide* by the attorney in arriving at a fair and just fee, indicates a moving away from this idea. The courts seem to indicate that they look upon the fixed rates of the schedules as mere persuasive evidence and not conclusive.[27] Certainly if the Committee was of the impression that a relaxing of its position on "undercharging" minimum fee schedules would not be in the best interests of the profession, they would never have changed their position.

The A.B.A. has had its problems in expressing to the local Bar Associations, as well as the people it serves, what position it was taking. Now after several formal and informal opinions,[28] and the adoption of a new Code of Professional Responsibility[29] two major conclusions can be drawn: (1) Undercharging even if persistent, is no longer enough of a basis for disciplinary action; (2) A new lawyer can reflect his inexperience and need in the fees he charges. The Committee, like a skilled matador, skewers its position with finality:

> When the customary minimum charge is reflected in a fee schedule, clearly it is proper for a lawyer to take this into account along with other elements in fixing his fee . . . In

---

[23] *Id.* No. 3.

[24] ABA CODE OF PROFESSIONAL RESPONSIBLITY AND CANNONS OF JUDICIAL ETHICS (1969).

[25] Letter issued by the American Bar Association Standing Committee on Ethics and Professional Responsibility, August 9, 1970.

[26] *Supra* note 21.

[27] Krieger v. Colby et al., 106 F. Supp. 124 (S.D.C.D. Cal. 1952); Weil, 205 La. 214, 17 So.2d 255 (1944).

[28] *Supra* note 13.

[29] *Supra* note 18.

> the light of this, the Committee has no hesitancy in holding that mere failure to follow a minimum fee schedule, even when habitual, cannot, standing alone and absent evidence of misconduct, afford a basis for disciplinary action.[30]

Kansas Relative Value Study: A Possible Solution

The Kansas State Bar Association found itself in need of a more flexible and realistic way to handle the matter of fees.[31] The vast majority of the Kansas Bar felt that minimum fee schedules were so structured as to prevent a realistic solution to the problem of what the fee should be for a specific legal service. The Bar was perplexed with the following: (1) How a schedule, which mandates $40 per hour for miscellaneous office consultation as a minimum charge, can be as appropriate for a new lawyer of no experience or reputation and unproven ability as it is for a lawyer with the converse of all three; (2) the variation in charges between lawyers in urban and rural areas; (3) lawyers with a low, moderate, or high overhead; (4) the difference between single, dual and multiple practitioners.[32]

Because of the negative answers to these questions the Kansas Bar put forth great personal effort by first conducting a study of the economics of the practice of law.[33] In this study the Association's Committee on Professional Economics studied other state bar schedules along with the procedures used by the medical profession. The association found that the Kansas Medical Society and other medical groups were using a fee guide called a "Relative Value Study." Immediately the Committee saw the advantages of such an approach and set about determining whether it could be adapted to the needs of the legal profession. Its work culminated in the submission of a partial Relative Value Study to its Bar members and the adoption of same at its 1967 annual meeting. Query, what is a Relative Value Study?

> It is a review and compilation of the relationship between actual charges for professional services, and then the assignment of point or unit values to the services. The point or unit value is determined giving consideration to the degree of skill required, complexity of the services and the time expended. Actually it is NOT a fee schedule. It represents an expression of the relative worth of one service to another. It leaves to the individual, or firm, or local Bar Association or State Bar Association the determination of converting the point or unit to an agreed monetary evaluation.[34]

---

[30] *Supra* note 25, at 2.

[31] ABA STANDING COMM. ON THE ECON. OF LAW PRACTICE, MINIMUM FEE SCHEDULES 31 (1971).

[32] *Id.*

[33] PROFESSIONAL ECON. COMM. OF THE BAR ASS'N. OF THE ST. OF KANSAS, Survey of the Economics of Law Practice (1964).

[34] *Supra* note 31.

The application of the Relative Value System is not as complicated as it may sound. For example, the Committee on the basis of its study, has affixed a permanent number of units to each of the different types of legal services e.g. Habeas Corpus (12); Petition (4); Motions (2-4); Trial per diem (8)[35] etc., as indicated by the *time, complexity* and degree of *skill* required. Next, it is up to the practitioner to determine what dollar amount will be set for one unit, i.e. if that amount is $20 then his fee for handling a Habeas Corpus proceeding would be $240 (12 x $20). The flexible feature of this system is in setting of the dollar amount per unit which allows the lawyer to take into consideration his overhead, locality, type of practice and skill. This system also supports the eight factors set out by the American Bar Association in DR 2-106 (B)[36] of the Code of Professional Responsibility, whereas minimum fee schedules only consider the third one, i.e. the fee customarily charged in the locality for similar services:

In summary the Kansas Relative value study has four distinct advantages over minimum fee schedules:

> (1) One of the outstanding features of the Relative Value Study is its flexibility. Each area of the state can determine its own monetary value after consideration of appropriate factors such as workload, return on investment desired, local economic and historic conditions. For example, a law firm in a larger city might believe it necessary to adopt a $30 per unit approach in which case that would be the multiplier for the units. Another office in another part of the state might use $20.
>
> (2) Once the value relationship is established, it is normally fixed and unchanged. The monetary or conversion factor is meant to approximate normal charges for the services rendered. The flexible feature of this approach to charges is the determination of the point or unit value to be applied to the factor. The unit value is changeable according to individual or area economics and the unit relationship is fairly static. Charges, thereby can be adjusted periodically without completely out-moding the schedule, as has been the case with dollar based schedules.
>
> (3) The same guidelines would be used throughout the state, although a higher conversion factor might be approved by one area or local association than another.

---

[35] *Supra* note 31 at 32, 33. Following are some selected portions of the Kansas Relative Value Scale. The number after the type of legal service is the fixed unit value given for that service. Kansas Supreme Court: (1)Per day, each appearance, argument only 10; (2)Per hour, preparation exclusive of actual argument 1. Kansas State District Court: (1)Answer or otherwise pleading to complaint, at least 3; (2)Conferences, preparation for, and drawing of third party complaint, motion, notice of motion and service thereof, at least 6; (3)Preparation of findings, and judgment or decree, including presentation to court and filing 3; (4)Preparation for and attendance at pretrial conference 3; (5)Conferences, preparation for, and drawing and serving of any motion, before trial, for summary judgment 4; Petition (exclusive of interview and investigation 4.

[36] *Supra* note 21.

(4) It should help lawyer income keep pace with increases in income enjoyed by other professions or at least cause one to periodically look into his costs of service in determining whether his conversion factor is too high or too low.[37]

Conclusion

The winds of change are blowing across the landscape of minimum fee schedules. Draconian approaches of the past are no longer warranted and are no longer defensible in the light of the Code of Professional Responsibility. The schedules lack of concern for all the variables that go into determining a fair, just fee have been revealed as too rigid. It is suggested that the Kansas Relative Value Study is a more flexible method for the lawyer to use in determining his fee and at the same time be justified in the eyes of the client. Perhaps the Relative Value Study will prove to be an empty promise but let it be pursued.

---

[37] *Supra* note 31, at 32.