Attorney's Fees & Commissions

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2026 Elected Clerks of Superior Court Winter Conference

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Goals for this Session

1. Attorney fees when PR is an Attorney
2. Attorney fees when PR is not an Attorney
3. Determining the Commission

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Attorney's Fees & Commissions

Attorney's Fees

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When PR is an Attorney

- The clerk is authorized to allow counsel fees to an attorney serving as a personal representative, collector or public administrator (in addition to the commissions allowed for those offices) where the attorney renders professional services ***beyond the ordinary routine of administration*** and of a type that would reasonably justify the retention of legal counsel. G.S. § 28A-23-4.
  - The need for legal services depends upon the circumstances of each case and may be affected by the nature of the assets, the number, age and location of heirs and beneficiaries, and the care with which the decedent attended to his business affairs. *Matthews v. Watkins*, 91 N.C.App. 640, 373 S.E.2d 133 (1988), *aff'd per curiam*, 324 N.C. 541, 379 S.E.2d 857 (1989).

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When PR is Attorney - *Matthews v. Watkins*

- There may be some services rendered by a lawyer personal representative which, in the context of a particular estate, constitute legitimate legal services beyond routine administration even though these tasks might be undertaken by a nonlawyer personal representative; for example:
  - lease negotiations,
  - conferences with Internal Revenue Service Agents, or
  - negotiations to sell real or personal property. In this last category, the personal representative may not be required to have legal assistance, but prudence may dictate that to retain legal counsel would be reasonably justified.
- The court shall not attempt to define all services which justify the payment of attorney's fees under G.S. 28A-23-4.
- The attorney personal representative should submit to the clerk a written request for fees supported by a statement detailing the specific legal services rendered.

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Services Beyond Ordinary Administration

- Did the attorney prosecute for, or defend, the estate in any estate proceedings, guardianship proceedings, special proceedings, civil actions, or other type of litigation?
- Did the attorney handle any issues with the IRS or NC Department of Revenue on behalf of the estate?
- Did the attorney handle matters on behalf of the estate before any type of government agency?
- Did the estate involve complex assets or require complex methods for handling and
- distributing the estate's assets?
- Did the estate involve an especially difficult family creating difficulties for the estate?
- Was the process to find and locate heirs and devisees of the estate especially complex or difficult?

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Services Beyond Ordinary Administration (cont'd.)

- Did the attorney draft any deeds, contracts, claim releases, demand letters, or other legal documents for the estate?
- Did the attorney have to resolve any trust, corporation, or partnership issues on behalf of the estate?
- Did the attorney initiate Medicaid planning or strategies for the estate?
- Did the attorney initiate tax planning or strategies for the estate?

******There is no defined list of the types of work that would fall within the definition of work beyond ordinary administration. The clerk must consider the specific facts and circumstances of each estate when making this determination.***

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Non-Attorney PR Standard

G.S. § 28A-23-3(d)(1) provides that clerks of superior court have the authority to allow "***reasonable*** sums for ***necessary*** charges and disbursements ***incurred in the management of the estate***." (Emphasis added.)

§ 28A-23-3. Commissions allowed personal representatives; representatives guilty of misconduct or default.

(d) Nothing in this section shall be construed to:

(1) Prevent the clerk of superior court from allowing reasonable sums for necessary charges and disbursements incurred in the management of the estate.

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PR's Hiring Power is not Payment Power

- A personal representative is ***authorized to employ*** persons, including attorneys, auditors, investment advisors, appraisers or agents to advise or assist the personal representative in the performance of his or her administrative duties. G.S. § 28A-13-3(a)(19).

- Pursuant to G.S. 28A-23-3(d)(1) the Clerk of Superior Court has the authority to allow attorneys' fees to a non-attorney PR, to be paid out of the estate, when the clerk determines the fees are ***reasonable and necessary for the management of the estate***. In re Taylor, 242 N.C. App. 30 (2015); See Also In re Est. of Seamon, 291 N.C. App. 547 (2023).

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What is reasonable and necessary for the management of the Estate?

- There is no simple answer.
- The clerk has discretion to decide.

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Factors to consider:

- Was work performed relating to assets of the estate?
- The question is not whether the services rendered by the attorney are beyond ordinary administration. Instead, the question for the Clerk is whether the fees requested are necessary and reasonable for the management of the estate.
- If the services rendered are beyond ordinary administration, the fees will often be reasonable and necessary for the management of the estate. However, when the fiduciary isn't an attorney, there is no requirement that the services rendered by the fiduciary's attorney be for work beyond ordinary administration.
- If the services rendered appear to be within what the Clerk considers routine administration, it is appropriate for the Clerk to require the fiduciary, and his or her attorney, to illustrate to you in the fee petition why the services rendered are necessary and reasonable for the estate to pay as a necessary expense.

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What NC court have said about atty fees generally

- In general, North Carolina appellate courts require the following factors to be addressed when a judicial officer makes findings of fact as to reasonable attorneys' fees:
  - The time and labor the attorney expended
  - The skill required for the work
  - A customary fee for like work (customary in the geographic area, particularly in the relevant field of law)
  - The experience and ability of the attorney

GE Betz, Inc. v. R.C. Conrad, 231 N.C. App. 214, 242–46 (2013).; *See also* N.C. R. Prof. Conduct 1.5.

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Hourly Rates

- There is competing case law regarding whether judicial officials may take judicial notice of the customary hourly rates for local attorneys performing the same services and having the same level of experience as an attorney representing a party seeking an award of attorneys' fees.
- In *Simpson v. Simpson*, 209 N.C. App. 320, 703 S.E.2d 890 (2011), the North Carolina Court of Appeals held that a district court judge, in the context of an award of attorneys' fees in a child custody modification action, may, but is not required, to take judicial notice of the customary hourly rates for local attorneys performing the same services and having the same experience as the attorney representing the party seeking the fee award.
- In *WFC Lynnwood I LLC v. Lee of Raleigh, Inc*., 259 N.C. App 925, 817 S.E.2d 437 (2018), the North Carolina Court of Appeals held, in the context of an award of attorneys' fees in commercial lease breach of contract action, a judge's judicial notice of comparable fees was insufficient evidence, on its own, to support the judge's finding that hourly rate was reasonable in its award of attorneys' fees.

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Hourly Rates – Best Practices

- In *Simpson*, the NC Court Appeals indicated that the better practice is for parties to <u>provide evidence of the customary local rates</u> rather than depending upon judicial notice.
- Given the competing case law, and the fact that neither case involved an estate, the best practice is to <u>**require at least some statement about customary hourly rates in the fee petition or supporting affidavits**</u>.
- If it is clear to you that the hourly rate sought falls outside of what you believe is a customary hourly rate in your jurisdiction for the work performed by an attorney with a similar level of experience, it is appropriate to request the attorney to submit additional evidence to you of the reasonableness of the hourly rate. Attorneys may submit affidavits from other attorneys in the local jurisdiction to prove reasonableness of an attorneys' fee.

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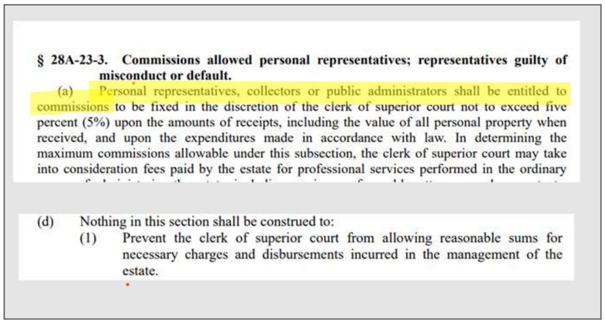
Who can ask for Attorney Fees?



§ 28A-23-3. **Commissions allowed personal representatives; representatives guilty of misconduct or default.**

(a) Personal representatives, collectors or public administrators shall be entitled to commissions to be fixed in the discretion of the clerk of superior court not to exceed five percent (5%) upon the amounts of receipts, including the value of all personal property when received, and upon the expenditures made in accordance with law. In determining the maximum commissions allowable under this subsection, the clerk of superior court may take into consideration fees paid by the estate for professional services performed in the ordinary

(d) Nothing in this section shall be construed to:

(1) Prevent the clerk of superior court from allowing reasonable sums for necessary charges and disbursements incurred in the management of the estate.

Authorized by statute:

- PR, Collector under Article 11

Who is NOT authorized by statute?

- Affiants in Small Estates (Collection by Affidavit)
- Limited PRs

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Is a Petition Required?

Yes.

- It is necessary for the PR to file a petition for commissions and fees along with annual accountings to enable the clerk to determine the amount of the commissions and attorney's fees. *In re Estate of Longest*, 74 N.C. App. 386 (1985).

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Who ***should*** ask for attorney's fees?

- Best practice: PR or Collector should be signing the petition for attorney fees.
- If the attorney is signing the petition…
  - OK if Attorney is also the PR.
  - If not,
    - OK to ask for signed consent from PR.
    - OK to set the matter for hearing.

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What happens to the fees that aren't approved?

It's the PR's ***personal*** financial responsibility to pay them.

- When a personal representative retains an attorney (or other professional) to assist in the administration of the estate, the personal representative is personally liable for the fees. The fees are not a debt of the estate, and the attorney does not become a creditor of the estate. If the attorney fees are proper, they will be allowed the executor in his or her settlement. *Kelly v. Odum*, 139 N.C. 278, 51 S.E. 953 (1905).
- If a personal representatives' attorneys' fees are not permitted by the Clerk, any remaining unpaid fees remain an individual debt between the attorney and the PR.

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Do you always need an order for attorney's fees?

Yes.

- Even if all the beneficiaries consent?
  - Yes.
  - Consent might be good evidence of what is necessary and reasonable, but **the clerk always has the responsibility** to determine that the fee is *necessary and reasonable*, regardless of what the beneficiaries and PR decide.
- The clerk should always enter an order and include findings as to whether the fees are necessary and reasonable.

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What if Attorney Provides Non-Legal Services or Appears to be doing most of the work?

- ***Remember:*** The need for legal services depends upon the circumstances of each case. *Matthews v. Watkins*, 91 N.C.App. 640, 373 S.E.2d 133 (1988).
- If the fees appear to be for tasks that would normally be considered routine administration, you can request more information as to why attorneys' fees should be granted for the work performed.
- ***Also Remember:*** You have a mechanism in G.S. 28A-23-3(a) to reduce commissions of a fiduciary when attorney's fees have been paid by the estate.
  - "...In determining the maximum commissions allowable under this subsection, the clerk of superior court may take into consideration fees paid by the estate for professional services performed in the ordinary course of administering the estate, including services performed by attorneys and accountants. However, the clerk is not required to reduce the maximum commissions allowed by the aggregate fees paid to professionals on a dollar-for-dollar basis."

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Are paralegal fees OK?

- Yes, the trial courts have this discretion. In *Lea Co. V. North Carolina Board of Transportation*, 323 N.C. 691, 695 (1989), the North Carolina Supreme Court held "A trial judge, acting within his discretion, may consider and include in the sum he awards as attorneys' fees the services expended by paralegals and secretaries acting as paralegals if, in his opinion, it is reasonable to do so."
  - The fees sought should be for actual paralegal work and generally should not include work that is "largely clerical in nature or, even if not, [that is] part of the ordinary office overhead and ought to be subsumed in the hourly rate of the attorneys."
  - Parties asking for paralegal fees should provide details in the petition of the legal nature of the paralegals' work. Beyond assessing the type of work done, the trial court also will examine the overall reasonableness of a paralegal's hourly rate and the number of hours billed.

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Appeal on Order for Attorney's Fees

- Should a party appeal the Clerk's order for attorneys' fees, the appeal to the Superior Court is pursuant to G.S. 1-301.3. *In re Taylor*, 242 N.C. App. 30, 774 S.E.2d 863 (2015).
- Appeal of the Clerk's order is "on the record."
  - The clerk when rendering a decision on the reasonableness of the attorneys' fees must hear evidence and enter an order that makes sufficient findings of fact and conclusions of law on the issue of reasonableness. This allows for a meaningful review of the issue on appeal to superior court under GS 1-301.3.
  - Whether you fully grant a petition for attorneys' fees, partially deny and partially grant a petition for attorneys' fees, or fully deny a petition for attorneys' fees, <u>the order you enter should be based on evidence you receive</u>, and your order should illustrate your interpretation of the evidence in your findings of fact and conclusions of law.

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Attorney Fee Best Practices

1. The fiduciary should sign petition. It is the fiduciary who is making the request that the estate pay the attorneys' fees instead of the fiduciary personally. The request is the fiduciaries to make, not the fiduciary's attorney. It's perfectly appropriate for the attorney to also sign the pleading, though. This also ensures the fiduciary and attorney both agree with the request.
2. The petition should be verified or accompanied by supporting affidavits. No matter whether you believe the petition for attorneys' fees is contested or will be appealed, you need evidence to support your order. By requiring verified petitions or supporting affidavits, you will at least have a sworn statement from the fiduciary. If you do not hold a hearing, absent a verified petition or supporting affidavits, you do not have evidence to support your order if it is appealed.
3. If you know the petition for attorneys' fee is contested or if you have reason to believe your order will get appealed, notice it and hold a hearing.

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Attorney Fee Best Practices (cont'd.)

5. The fiduciary has the burden to prove to you that the estate should pay the attorneys' fees request.
6. The fee petition should explicitly detail what work was performed and why the work is beyond ordinary administration, or why the work is necessary and reasonable for the estate to pay for.
7. If you are not satisfied with the information provided to you by fiduciary and/or the attorney, you can request more information to supplement what he or she has already provided in the fee petition.
8. If you are not satisfied with the information provided, or if you aren't able to get sufficient information to justify attorneys' fees requested, hold a hearing!

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Attorney's Fees & Commissions

Commissions

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Clerk's Authority to Award Commissions – G.S. 28A-23-3(a)

Personal representatives, collectors or public administrators shall be entitled to commissions to be fixed in the discretion of the clerk of superior court not to exceed five percent (5%) upon the amounts of receipts, including the value of all personal property when received, and upon the expenditures made in accordance with law. In determining the maximum commissions allowable under this subsection, the clerk of superior court may take into consideration fees paid by the estate for professional services performed in the ordinary course of administering the estate, including services performed by attorneys and accountants. However, the clerk is not required to reduce the maximum commissions allowed by the aggregate fees paid to professionals on a dollar-for-dollar basis.

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Clerk's Authority to Award Commissions – G.S. 28A-23-3(a)

Personal representatives, collectors or public administrators shall be entitled to commissions to be fixed in the discretion of the clerk of superior court ***not to exceed five percent (5%)*** upon the amounts of **receipts**, including the value of all personal property when received, and upon the **expenditures** made in accordance with law. In determining the maximum commissions allowable under this subsection, the clerk of superior court may take into consideration fees paid by the estate for professional services performed in the ordinary course of administering the estate, including services performed by attorneys and accountants. However, the clerk is not required to reduce the maximum commissions allowed by the aggregate fees paid to professionals on a dollar-for-dollar basis.

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How do commissions happen?

- Best practice – wait until petition is filed.
- Clerk responds to the PR's request.
- To avoid confusion, request should be in writing.

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When do commissions happen?

Commissions generally are not allowed until the final account but by statute commissions may be allowed and paid at any time during the administration of the estate. G.S. § 28A-23-3(c)

1. In larger estates, which are expected to take a long time to settle, the clerk may allow commissions before the final account.
2. If the clerk allows commissions during the administration of an estate, it is a good practice to allow them only in conjunction with an accounting so there is proper documentation to support the order.
3. The clerk should not award commissions until work has been performed. In other words, the clerk should not allow commissions to be paid in advance and should not grant a request for commissions included in the inventory.
4. Since the total commissions allowed to all personal representatives (including co-representatives and successor representatives) cannot exceed 5% of commissionable personal property receipts and disbursements (unless otherwise specified in the will), ***the clerk should be cautious about allowing a significant portion early in the administration***. There is always the possibility of a successor personal representative who may subsequently be entitled to commissions.

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When can commissions be paid to PR?

- After the clerk enters an order awarding commissions.
- The clerk must approve the petition before payment of the commission.
  - Co-executor's letters revoked for, among other things, advancing commissions to himself before clerk's approval of same. *In re Longest*, 74 N.C.App. 386, 328 S.E.2d 804 (1985).

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Does PR have to take a commission?

- No.
- A personal representative may wish to waive or renounce the commission for income tax purposes.
  - Commissions are taxable income to the PR. If they are also a beneficiary, they may not want a portion of what they received to be taxed.
- A PR can file a waiver or renunciation but is not required to.

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"I get 5%, right?"

When the will does not make provisions as to commissions, the clerk has discretion to fix the amount of the commission provided that it does not exceed 5% of receipts and disbursements.

1. **The personal representative is not automatically entitled to 5% of receipts and disbursements.** The 5% limitation is a statutory maximum.
2. In determining the amount of the commissions, the clerk shall consider the time, responsibility, trouble, and skill involved in the management of the estate. G.S. § 28A-23-3(b).
3. **It may be necessary to remind attorneys and fiduciaries that commissions and fees are awarded pursuant to the standard in subsection 2 above**.
4. The clerk may take into consideration fees paid by the estate for professional services performed in the ordinary course of administering an estate, including services by attorneys and accountants, but is not required to reduce the maximum commission to the personal representative by the aggregate fees paid to professionals on a dollar-for-dollar basis. G.S. § 28A-23-3(a).
5. *Caution:* If the personal representative has been appointed to sell property in a special proceeding, be careful not to allow "double dipping" by getting compensation for selling the property and then a commission when the estate receives proceeds.

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Exception to 5% limit

When the gross value of the estate is $2,000 or less, the 5% limitation is not applicable and the clerk may fix the commission in an amount that in his or her discretion is just and adequate. G.S. § 28A-23-3(a).

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Exception to 5% limit

When the will gives directions as to commissions:

1. ***When the will specifies a stipulated amount or method*** or standard for determining the compensation for the services rendered, the will provision applies rather than the 5% maximum provision. This is also true if the will states that the compensation is to be determined by applying the personal representative's regularly adopted schedule of compensation in effect at the time of performance of those services. G.S. § 28A-23-3(g).

2. If the will provides that the personal representative is to receive ***"reasonable compensation"*** (or similar language to that effect), the 5% maximum will not apply **if** the personal representative and all the beneficiaries whose shares would be charged with paying the compensation consent in writing to the specific amount that constitutes reasonable compensation. G.S. § 28A-23-3(g).

Exception:

- When the will provides that compensation of the personal representative is the amount ***"as prescribed by law" or the "maximum provided by law," or other similar language***, the commission set out in G.S. § 28A-23-3(a) (the 5% statutory maximum) applies. G.S. § 28A-23-3(h).

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Do more PRs = more commissions? No!

- If there is more than one personal representative during the administration of an estate, the final sum allowed as commissions cannot exceed the 5% limitation and should be apportioned among the personal representatives according to the services each rendered.
- This is true for co-executors as well as successor personal representatives.

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What can prevent commissions?

- When is a PR barred from receiving a commission?
  - A personal representative whose misconduct results in revocation of his or her appointment is not entitled to any commission. G.S. § 28A-23-3(e).

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Receipts that are commissionable

- Value of all personal property when received is commissionable. G.S. § 28A-23-3(a).
- Where real property is sold to pay debts or legacies, the portion actually applied in the payment of debts or legacies is commissionable. G.S. § 28A-23-3(b). The portion of sales proceeds not used to pay debts, but which is instead distributed directly to heirs, is not commissionable.
- Any portion of dividends, interest, rents or other amounts payable to a personal representative, collector, or public administrator that is withheld for income tax purposes is commissionable. G.S. § 28A-23-3(f).

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Disbursements that are commissionable

- The disbursement that is commissionable is **an expenditure** and not a distribution to an heir or devisee. However, not all disbursements are commissionable.
- Distributions to beneficiaries are not expenditures and therefore are not commissionable. G.S. § 28A-23-3(d)(2).

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Clerks’ Manual Appendices I and II

APPENDIX I

Commissionable Receipts Table

RECEIPTS (in alphabetical order)	**COMMISSIONABLE**	**NOT COMMISSIONABLE**
Advancements reimbursed		✓
Any portion of rents, interest, dividends or other income that must be withheld for income tax purposes	✓ [G.S. 28A-23-3(f)]	
Assets that may be acquired by the PR to pay debts pursuant to G. S. 28A-15-10	✓ These include: 1. Totten trusts created by the decedent in savings accounts for other persons 2. gifts causa mortis made by decedent	

APPENDIX II

Commissionable Disbursements Table

DISBURSEMENTS (in alphabetical order)	**COMMISSIONABLE**	**NOT COMMISSIONABLE**
Distributions to heirs or devisees		✓ [G.S. § 28A-23-3(d)(2)]
Inheritance taxes and all other taxes	✓	
Interest paid on properly authorized loans made by fiduciary	✓	
Payments of debts to creditors	✓ If debts paid by heirs, reimbursement of heirs by estate is commissionable.	
Payments of debts and legacies from proceeds of real property sold to pay debts or legacies	✓ [G.S. § 28A-23-3(b)]	
Payment of cash to widow in lieu of		✓

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Where does it say that attorney’s fees aren’t expenditures?

Basis for CM guidance:

- Attorney fees are paid out for work “in the management of the estate.”
- Commissions are paid to the PR for the work of managing the estate.
- In determining the amount of the commissions, the clerk must consider the time, responsibility, trouble and skill involved in the management of the estate. G.S. 28A-23-3(b).
- By hiring these third parties, the PR is essentially using estate assets to hire others to do that work. The idea is that those are not then commissionable disbursements when some other person did the work.

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