

This sample is taken from *Wills and Personal Planning Precedents: An Annotated Guide*.

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O. COMPENSATION [§30.62]

1. COMPENSATION OF ATTORNEY AT SET RATE [§30.63]

I authorize my [Attorney/Attorneys] to pay compensation from my estate to my [Attorney/Attorneys] at the rate of \$ [rate] per [hour/ month/year] starting from the date on which my [Attorney/ Attorneys] first [exercises/exercise] authority on my behalf until my [Attorney's/Attorneys'] authority ends [and if I have more than one Attorney, my Attorneys may divide or allocate the compensation among themselves in whatever proportions they decide].

Section 24(1) of the *Power of Attorney Act* provides that an attorney must not be compensated unless the power of attorney “expressly authorizes the compensation and sets the amount or rate”. Given the specific reference to “amount” or “rate” in the *Power of Attorney Act*, we cannot be confident that a reference to Trustee Act remuneration or to a maximum percentage will suffice. See F. Hunter, “Issues for Grantors of Enduring Powers of Attorney: Part II” in *Incapacity Planning: the New Law* (CLEBC, 2011).

If the power of attorney sets out circumstances wherein the authority of the attorney is suspended under s. 29(1) of the *Power of Attorney Act*, you may want to modify this compensation clause so that compensation is not payable while the authority is suspended.

Canada Revenue Agency will take the position that compensation paid to attorneys will be taxable as income from an “office”.

2. COMPENSATION OF ATTORNEY AT SET AMOUNT [§30.64]

I authorize my [Attorney/Attorneys] to pay annual compensation from my estate to my [Attorney/Attorneys] in an amount equal to the sum of:

- (a) 5% of the income earned of my estate; and
- (b) 0.4% of the average market value of my estate,

starting from the date on which my *[Attorney/Attorneys]* first *[exercises/exercise]* authority on my behalf until my *[Attorney's/ Attorneys']* authority ends *[and if I have more than one Attorney, my Attorneys may divide or allocate the compensation among themselves in whatever proportions they decide]*.

See the commentary at “Compensation of Attorney at Set Rate” in this chapter. We have included a calculation of remuneration based on the income and care and management fees typically charged by trustees under the *Trustee Act*. Your client may wish to amend the rates or include a provision permitting the attorney to charge compensation based on the capital value of the estate or that portion of the estate over which the power of attorney extends (similar to the maximum of 5% of gross aggregate value of the estate provided under s. 88(1) of the *Trustee Act*).

3. COMPENSATION OF ATTORNEY AT SET RATE AND PAYMENT OF PROFESSIONAL FEES (CHARGING CLAUSE) [§30.65]

If any of my Attorneys is a lawyer, accountant, stockbroker, or other professional person, that Attorney, or that Attorney’s firm, may be employed by my Attorney to act in that professional capacity. I authorize my Attorney to pay from my estate that Attorney, or that Attorney’s firm, the usual professional fees and other charges for professional services provided by that Attorney or that Attorney’s firm. For other services as an Attorney, that Attorney and the other *[Attorney/Attorneys]*, if any, may be paid compensation from my estate at the rate of \$ *[rate]* per *[hour/month/year]* starting from the date on which my *[Attorney/Attorneys]* first *[exercises/exercise]* authority on my behalf until my *[Attorney's/Attorneys']* authority ends *[and if I have more than one Attorney, my Attorneys may divide or allocate the compensation among themselves in whatever proportions they decide]*.

This clause authorizes the professional attorney to be compensated at their professional rate only for professional services rendered, but not at professional rates for “attorney work”.

In the absence of a charging clause, if an attorney (or one of their partners) charges the estate for professional fees, the attorney may be guilty of profiting from their position of trust. If an attorney is a lawyer, accountant, stockbroker, real estate licensee, investment advisor, or other like professional, you should seek your client’s instructions about including this clause (or something similar). Alternatively, the following provision deals with the exceptional situation where the client wishes to indemnify the professional

attorney at that attorney's professional rates for all work done by that attorney, including "attorney work".

See the commentary at "Compensation of Attorney at Set Rate" in this chapter, and to "Consent to Reorganization" in chapter 20.

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